FINANCING PROVISIONS OF H.R. 3800, SUPERFUND REFORM ACT OF 1994

Y 4.W 36:103-94

Financing Provisions of H.R. 3800,...

HEARING

BEFORE THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

JULY 25, 1994

Serial 103–94

Printed for the use of the Committee on Ways and Means

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FINANCING PROVISIONS OF H.R. 3800, SUPERFUND REFORM ACT OF 1994

MONDAY, JULY 25, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
Washington, D.C.

The committee met, pursuant to call, at 11:07 a.m., in room 1100, Longworth House Office Building, Hon. Sam M. Gibbons (acting chairman of the committee) presiding.

[The press releases announcing the hearing follows:]

FOR IMMEDIATE RELEASE
WEDNESDAY, JULY 13, 1994

PRESS RELEASE #26
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE SAM M. GIBBONS (D., FLA.), ACTING CHAIRMAN, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A HEARING ON THE FINANCING PROVISIONS OF H.R. 3800, THE SUPERFUND REFORM ACT OF 1994

The Honorable Sam M. Gibbons (D., Fla.), Acting Chairman, Committee on Ways and Means, U.S. House of Representatives, today announced that the Committee will hold a hearing on the financing provisions of the Administration's Superfund proposal, H.R. 3800, the Superfund Reform Act of 1994. The hearing will be held on Tuesday, July 26, 1994, beginning at 10:00 a.m. in the Committee's main hearing room, 1100 Longworth House Office Building.

In announcing this hearing, Acting Chairman Gibbons stated: "In light of the progress being made by the authorizing committees, it is appropriate for the Committee on Ways and Means to begin consideration of the financing provisions of the Administration's Superfund Reform Act of 1994 at this time."

Representatives of the Administration are expected to be the lead-off witnesses, to be followed by public witnesses.

BACKGROUND:

General authorization of appropriations for the Superfund program will expire September 30, 1994. The taxes which fund the Superfund program are scheduled to expire December 31, 1995.

On February 2, 1994, the Administration submitted H.R. 3800, the Superfund Reform Act of 1994, to the Congress. The bill was introduced on February 3, 1994, by request, and jointly referred to the Committees on Energy and Commerce, Public Works and Transportation, and Ways and Means. The Committee on Energy and Commerce favorably reported H.R. 3800, as amended, on June 30, 1994 (H. Rept. 103-582, Part I).

The Committee on Ways and Means has jurisdiction over Title IX, the financing title of H.R. 3800. Title IX would extend the tax on petroleum, feedstocks and imported chemical derivatives (Code Sec. 4611), and the corporate environmental tax (Code Sec. 59A) for five years.

In addition, by separate submission, the Administration has proposed to add to Title IX of H.R. 3800, a mechanism for financing its proposed Environmental Insurance Resolution Fund, contained in Title VIII of the bill. The proposal would impose (1) a fee on persons with potential base-period exposure based on commercial net premiums written by domestic insurers and reinsurers (with special rules applicable to foreign insurers and reinsurers) for contracts providing certain U.S. commercial liability insurance during the period from 1971 through 1985, and (2) a fee on current-year premiums from certain commercial insurance of U.S. risks written by domestic and foreign insurers.

The bill further provides for tax exemption for the new Fund.

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD:

Individuals and organizations interested in presenting oral testimony before the Committee must submit their requests to be heard by telephone to Harriett Lawler, Diane Kirkland, or Karen Ponzurick [(202) 225-1721] no later than Tuesday, July 19, 1994, to be followed by a formal written request to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The Committee staff will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning a scheduled appearance should be directed to the Committee [(202 225-1721].

Persons and organizations having a common position are urged to make every effort to designate one spokesperson to represent them in order for the Committee to hear as many points of view as possible. Time for oral presentations will be strictly limited with the understanding that a more detailed statement may be included in the printed record of the hearing (see formatting requirements below). This process will afford more time for Members to question witnesses. In addition, witnesses may be grouped as panelists with strict time limitations for each panelist.

In order to assure the most productive use of the limited amount of time available to question hearing witnesses, all witnesses scheduled to appear before the Committee are required to submit 200 copies of their prepared statements to the Committee office, room 1102 Longworth House Office Building, at least 24 hours in advance of their scheduled appearance. Failure to comply with this requirement may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Persons submitting written statements for the printed record of the hearing should submit at least six (6) copies by the close of business on Monday, August 1, 1994, to Janice Mays, Chief Counsel and Staff Director, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements for the record of the printed hearing wish to have their statements distributed to the press and the interested public, they may provide 200 additional copies for this purpose to the Committee office, room 1102 Longworth House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee:

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

****

*** NOTICE--CHANGE IN DATE AND TIME ***

FOR IMMEDIATE RELEASE
THURSDAY, JULY 14, 1994

PRESS RELEASE #26-REVISED
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE SAM M. GIBBONS (D., FLA.), ACTING CHAIRMAN, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A CHANGE IN DATE AND TIME FOR THE HEARING ON THE FINANCING PROVISIONS OF H.R. 3800, THE SUPERFUND REFORM ACT OF 1994

The Honorable Sam M. Gibbons (D., Fla.), Acting Chairman, Committee on Ways and Means, U.S. House of Representatives, announced today that the hearing on the financing provisions of H.R. 3800, the Superfund Reform Act of 1994, scheduled for Tuesday, July 26, 1994, beginning at 10:00 a.m. in the main Committee hearing room, 1100 Longworth House Office Building, will be held instead on Monday, July 25, 1994, and begin at 11:00 a.m.

All other details for the hearing remain the same. (See press release #26, dated July 13, 1994.)

*****

Acting Chairman GIBBONS. Well, good morning.

Today, the Ways and Means Committee begins the consideration of the financing provisions of H.R. 3800, the administration's Superfund reauthorization and reform legislation. This legislation was jointly referred to the Committee on Energy and Commerce and to Public Works and Transportation which have jurisdiction over the Superfund program.

The authorization for the Superfund program is scheduled to expire September 30 of this year.

The Energy and Commerce Committee reported the bill on June 30, 1994. The Public Works Committee has scheduled action on the bill this week.

The Ways and Means Committee is responsible for financing the Superfund program. Superfund has been financed by excise taxes on petroleum, feedstocks, and imported chemical derivatives and the corporate environmental income tax. These taxes are scheduled to expire on December 31, 1995.

In addition, in the bill submitted by the administration and reported by Energy and Commerce, a new environmental insurance resolution fund was established to provide settlements to potentially responsible parties from property and casualty insurance companies. The administration proposes to finance this newly established fund with a premium tax on the property and casualty insurance industry.

The committee is interested in trying to understand how this proposed tax will affect members of the industry and whether it will be adequate to finance fully the new fund.

The Subcommittee on Oversight has been active in reviewing the administration of the Superfund. I appreciate Congressman Pickle's leadership in this area and recognize him for any opening statement that he might like to make.

Mr. PICKLE. I thank you, Mr. Chairman, and I am pleased that you are holding this hearing to explore further the possibility of corrections in the Superfund program.

Our hearing today is intended to focus on the extension of the taxes that fund the Superfund program because that is directly in our jurisdiction. But I don't think we ought to reauthorize these taxes without first assuring ourselves that the cleanup program deserves our continued support.

In the past, performance of EPA does not warrant automatic renewal or approval, not on the basis of its performance. I want to review for the committee a few of the things that have happened in the past 2 years.

The Subcommittee on Oversight has held four hearings where we reviewed problems with the Superfund program. Committee staff has visited actual Superfund sites throughout the country and has held meetings with the EPA personnel overseeing the cleanup activities and meeting with the PRPs, the responsible parties or potentially responsible parties who are liable for the cleanups, and we have met with attorneys and insurance companies involved in the cleanups.

We have kept in close contact with the EPA and with the Energy and Commerce Committee as we have moved along on this road

toward reform. What we have learned about Superfund over the past 2 years has not been encouraging.

After 13 years and expenditures of about $13 billion, the Government has not made much progress in this effort to clean up the Nation's toxic waste sites. As of January of this year, only 218 of 1,418 Superfund sites have been cleaned up. And that figure, 218, may be an exaggerated number. I have asked EPA to give us the complete list of these sites.

The program has been plagued by endless litigation, delay, waste and mismanagement. The cleaning up of Superfund sites now costs an average of $30 million and takes more than 10 years. Superfund sites are studied and restudied, languishing for years in the EPA pipeline. The number of sites to be cleaned up grows as more and more Superfund sites are identified.

Of the $13 billion that EPA has sent so far, the agency has recovered less than $1 billion from the PRPs, and EPA admitted that you would have to write off millions more.

So what I am concerned about most today is that this hearing determine will the Superfund program work and what will we get for our money? I do not want to have any part of continuing a program that plows along the same road of endless litigation and high costs. I hope these questions we talked about today will be answered.

Mr. Chairman, I don't want to be negative or hostile about this. Because I recognize that our mission must be accomplished. We must cleanup these sites.

So far, the program has been an embarrassment. I just don't want our committee, the Ways and Means, to vote for additional taxes, not a penny, unless we can get results as intended.

So I want to be as cooperative as I can, and I think this meeting is helpful, and I look forward to statements being made because I know that the administration considered this a matter of great importance and will be asking us to cooperate. And I offer my cooperation, but I also think some hard questions ought to be asked.

Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Mr. Pickle, I agree with you thoroughly. I think the "polluter pays" principle in the original bill has been carried to its utterly ridiculous extreme. We have wasted more time and money and effort chasing down people that had only remote connection with a pollution site. And I think it has been a disgrace the way that has been carried on.

For instance, they have chased little filling station operators around my district like they were on the FBI most-wanted list to clean up what they think may have been contributed to some cleanup site by an oil reprocessor. It is ridiculous to put people like that to that kind of burden of proof in demonstrating that they were not polluters.

And I hope whoever is listening to this statement takes it to heart because, unless I am assured that that kind of conduct on the part of our Government is stopped, I don't intend to approve any tax changes in this bill. I don't know who is responsible out there for that, but I want a discussion with them personally or this tax bill is going to stop. We won't ever get to another hearing on it.

Mr. Houghton, do you have any statement?

Mr. HOUGHTON. Just a brief comment, Mr. Chairman. Thank you very much.

I would like to back up what Mr. Pickle said. He and I have worked closely. I admire his leadership. He has put a fine point on this issue, and I think we are about to hear some interesting testimony by the Treasury.

There are four issues here. One is the issue of the management. Can we expect that the management would do a better job in the next few years than it has done in the past in terms of really doing the basic cleanup that is necessary for the Nation?

Second, is there a way to funnel more money into the cleanup process and wave the litigation process?

Third, is this a team game between the prospective and the retrospective issue.

And, fourth, the taxes. I think the administration is proposing something which we should take a very close look at. And I think the purpose of the fund is a good one, but it would be a misstatement to think there is unanimity of opinion, particularly on the fee structure.

Today will give a good opportunity to evaluate this proposal and the insurance statutes and decide whether it is the right thing to do. And I support what you are doing, sir. Thanks very much.

Mr. HANCOCK. Mr. Chairman, I think the main message we which came out of the subcommittee hearings and all our discussions is that we are spending an awful lot of money on legal fees, and we are never getting around to doing anything as far as the environment is concerned.

I noticed the other day that a magazine listed an environmental attorney as being the number one job for the future. I don't know really know what that accomplishes when we are spending this kind of money.

I agree with the statement that you made. Until the Superfund program is reformed, we should put them on notice that there is not going to be a tax to pay for this program if all the revenue is going to be spent in litigation.

Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Mrs. Kennelly.

Ms. KENNELLY. Thank you.

First, I would like to thank the administration for undertaking this effort. Early on, they realized what Mr. Pickle has stated so strongly, that the Superfund program isn't working. And they set about to find a solution to the situation because we do have a problem in this country that we still have to resolve, recognizing the multiyear efforts on the coalition of Superfund.

The administration finally got the PRPs, the environmentalists and the insurers to agree on a proposal, a major achievement. I commend them for doing this and for putting so much time in this effort.

I support the reauthorization of Superfund and the environmental insurance resolution fund. I agree that there has been far too much litigation. But I also agree that there has to be continual cleanup of the environment.

I do, however, have a number of concerns about the structure of the EIRF. The administration's proposal would fund the EIRF such

as it would be 70 percent of the funds are collected on a retroactive basis and 30 percent on a prospective basis. I strongly feel if there is going to be a tax, it should be 100 percent prospective, and at the appropriate time I plan to offer an amendment to that effect.

When this committee first provided for the financing of the program we rejected a retroactive feed stock tax on the polluters. And, in light of that, it makes no sense to tax the insurers retroactively, remembering that an insurance company has never polluted anything.

The committee has historically been reluctant to levy retroactive taxes. We took a great deal of heat on putting the January 1st date on the tax increases last year.

I come from Connecticut, and I think I heard from every single person who found out that they were going to have to pay their tax in a retroactive manner. They didn't feel it was fair.

And I can't imagine what people would think about a retroactive tax from 1971. This would create a tremendous disruption in an already competitive marketplace. And companies that get into this business after the passage of the bill would have little or no tax liability and, thus, have a competitive advantage over those in the business for years.

The insurance industry in general and the AIA companies in general are volunteering to pay $8 billion—$8 billion. And we know on this committee, dealing and welfare reform, how hard it is to raise money. With this amount of money on the table we should see that it is done right and structured correctly.

I would caution that while it is true that some segments of the insurance industry oppose the tax it should be noted that some of these same people who are opposing the tax are literally opposing the bill and do not want to see the reauthorization of the Superfund.

Thank you, Mr. Chairman. I appreciate you having these hearings at such a time, and I think it is an issue that we have to face. It is not going to be a pleasant issue, but it is part of our job to make the hard decisions. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Thank you.

Mr. Samuels, I welcome you to be our first committee witness from the Treasury Department, and I welcome Alicia Munnell, Assistant Secretary for Economic Policy.

Mr. Samuels and Ms. Munnell, your entire statements will be included in the record. You may begin.

Mr. SAMUELS. Mr. Chairman, if it is acceptable, Assistant Secretary Munnell will start with an overview, and then I will describe the financing in detail.

STATEMENT OF HON. ALICIA H. MUNNELL, ASSISTANT SECRETARY FOR ECONOMIC POLICY, U.S. DEPARTMENT OF THE TREASURY

Ms. MUNNELL. Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today.

Our thought was that before Assistant Secretary Samuels discusses the specific funding proposals that are the subject of today's hearings that it might be useful to provide you with some background on the broadest issue of Superfund reform.

As you well know, Superfund was enacted in 1980 in response to public outcry over Love Canal and Valley of the Drums and other environmental disasters. The original vision was that the program would involve relatively inexpensive cleanups of a few hundred sites. As the chairman and the other members of the committee have acknowledged, actual events have turned out to be quite different.

Currently, EPA has roughly 1,300 sites on the national priority list. Most observers envision an eventual number of at least 3,000, and cost estimates for the entire program are running as high at $150 to $300 billion.

Major problems are that fewer than 20 percent of the identified priority sites have been cleaned up to date. And for every dollar spent more than 25 percent goes to lawyers and transaction costs. The incentives in the system are all wrong. They lead to pressure for Cadillac-type cleanups and endless wrangling over who is going to pay and how much.

The current system is in desperate need of reform. The wisest observation that I have heard so far in the reform process is that if parties believed that they were being allocated their fair share of cleanup costs and they had confidence that their money would be wisely spent at cleanup sites, the litigation would end and the cleanup would start. Therefore, fair allocation of liability and reasonable cleanup standards comprise the centerpiece of the administration's Superfund reform proposal.

First, let me say a brief word about the new cleanup standards. A more coherent procedure for determining how to clean up sites will not only protect human health and the environment, something that is obviously important to all of us, but will also save money. New standards will take account of land use. It will no longer be necessary to clean up a site so that children can eat the dirt of the site if the land is going to be used for a factory. The new system will also move away from a preference for treatment and permanence. It will no longer be assumed that burning the dirt is always preferable to reliably precluding access to a site. Finally, costs will be considered when selecting among alternative remedies. Our hope and expectation is that more sensible cleanup strategies will reduce costs from 20 to 25 percent.

Next is the crucial issue of liability: Who should pay for the cost of cleanup and how much should they pay? The transaction costs associated with cleanups, especially litigation expenses, have been massive under current law.

The litigation takes three forms: First, PRPs, the potentially responsible parties, identified by EPA under the law's strict joint and several and retroactive liability provisions, will strongly resist because they can be held responsible for the entire cost of cleaning up a site. Second, a targeted party will go out and sue anyone else who either plausibly or implausibly could share the burden. Third, all PRPs try to recover their Superfund costs from their insurance companies.

To address the first two types of litigation, the bill establishes a more reasonable mechanism for allocating costs among parties. The bill provides that most small businesses will be out early and without great expense. The bill also establishes a process for allocating

shares among all remaining PRPs at a site in a single process. In this process, the remaining PRPs will sit at a table, and a mediator will allocate liability based on factors such as the volume and toxicity of their waste. Parties who accept the allocation will, one, be protected from the suits by other PRPs; two, will benefit from EPA's funding of orphan shares, shares established in either the early settlement process or attributable to insolvent parties; and, three, these settling parties for a fee are protected from future liability for some undiscovered harm. The large businesses that run most of the cleanups will be treated much more fairly.

Getting, at last, to the focus of today's hearing, the administration proposal aimed at the growing problem of Superfund-related insurance litigation. When a party is hit with cleanup costs under Superfund and seeks recovery from its insurance company, the insurance company says that its policies were not written to cover Superfund costs. The dispute between the insurance company and the PRP inevitably ends up in court and is very expensive to resolve. Some courts have found for the PRPs; some courts have found for the insurers. It varies significantly from State to State.

In January, the administration began working with representatives from the insurance industry and from the PRP industry to fashion a proposal that would avoid much of this litigation. The product was the creation of an Environmental Insurance Resolution Fund that would be financed by fees and assessments on property and casualty insurers and reinsurers.

I think that the insurance industry and the industrial companies represented in these deliberations deserve a great deal of credit for putting aside their narrow self-interest in trying to devise a way to save a lot of the litigation costs.

Although the plan has been revised as the bill has progressed, the essence of the plan is this: When PRPs emerge from the allocation process they will walk over to the Resolution Fund window where they will receive a settlement offer based on the location and litigation venue of all their sites. Companies will sites and venues only in California and seven other States would be offered 60 cents on the dollar; those with sites in Florida will be offered 20 cents on the dollar; those in the remaining States would fall into the 40 cents a dollar category. So that they cannot cherrypick, PRPs would be required to make a decision for all their sites at the time of the Resolution Fund's offer. If the PRPs accept the offer, they waive their right to sue their insurance companies for eligible costs. If they reject the offer, they can go ahead and sue just as they would under current law.

The original plan was structured for a 5-year period and involved fees on the insurance industry of up to $3.1 billion. Treasury spent a lot of time worrying about how to structure these fees. As you know, our current proposal is to raise 70 percent of the funding through a retrospective fee and the other 30 percent by a prospective assessment on premiums. Assistant Secretary Samuels will discuss these issues in more detail. While we think our proposal strikes a logical balance between retrospective and prospective, we are firmly committed to Superfund reform. We do not want the particular financing provision of the Resolution Fund to be an obstacle to passing Superfund reform this year.

To conclude, no one is happy with every aspect of the proposed Superfund reauthorization bill. No one wants to invest scarce resources to clean up problems left over from the past, but it has to be done—not only because Superfund sites are a health hazard but because they are also an economic hazard. These sites need to be cleaned up and redeveloped to add to the well-being of the communities in which they are located, not subtract.

The proposed bill makes great strides in addressing the shortcomings of the current system. That is why the administration is happy to support it and why it has received such widespread support for those with an important stake in Superfund reform.

Thank you very much.

STATEMENT OF HON. LESLIE B. SAMUELS, ASSISTANT SECRETARY FOR TAX POLICY, U.S. DEPARTMENT OF THE TREASURY

Mr. SAMUELS. Mr. Chairman and members of the subcommittee, I am pleased to describe the administration's proposals for funding the Superfund Reform Act, H.R. 3800, including, in particular, the Environmental Insurance Resolution Fund.

Before turning to the environmental insurance reform mechanism that would reduce the wasteful litigation that Secretary Munnell has just discussed, let me briefly address the extension of certain existing taxes in connection with Superfund reform.

As you know, we now finance the hazardous substance Superfund trust fund with excise taxes on domestic crude oil and imported petroleum products, certain chemicals and imported derivative products and a corporate environmental tax.

These taxes are scheduled to expire at the end of 1995. Under H.R. 3800, the Superfund Trust Fund has continuing financial needs. Consequently, we would extend these excise taxes and the corporate environmental tax to the end of the year 2000.

Now I will turn to the main topic of today's hearings, environmental insurance reform. That is, reforming the costly and drawn-out litigation between potentially responsible parties, the so-called PRPs, and their insurance companies and how we propose to finance it.

This massive litigation involves whether insurance policies written prior to 1986 covered losses from environmental damage. Why before 1986? Because insurers changed their policy forms in 1986 to exclude environmental liability from coverage.

For the pre-1986 insurance, the issue is whether the policies covered losses from environmental damage. The fight goes on and on, and the parties have spent enormous sums of money.

As a result of this litigation morass, only 12 cents of every $1 spent by the insurance industry has gone to cleaning up hazardous waste sites. That is right. That means 88 cents of every $1 spent by the insurance industry is on litigation. This extremely unfortunate situation, which involves very real social and economic costs, has driven all parties toward reform. And, as Secretary Munnell has said, that is why the administration has proposed the Environmental Insurance Resolution Fund which I will refer to today as the Fund.

Reform through use of the Fund goes a long way to remove the uncertainty of litigation. It allows everyone to save on the time and costs of settling coverage claims and to devote those resources to cleaning up sites.

Dr. Munnell describes the Fund as the vehicle to facilitate settlements between the PRPs and insurers. When the PRPs accept their settlement offers the Fund must have the financial resources to make good on those offers.

Under the administration's original proposal the Fund would need $3.1 billion for the first 5 years of its life so we designed a financing mechanism that would require the insurance industry to pay into the fund $3.1 billion over 5 years. When the Energy and Commerce Committee favorably reported the legislation, the 5-year proposal became a 10-year proposal, so additional funding of $5 billion for 5 more years was needed.

To determine how to equitably raise the necessary funds we met with many insurance industry representatives to gain a better understanding of the Superfund problems. We then developed a financing proposal based on four principles. Once you understand these principles, I believe the proposal becomes more easily understood.

Our first principle is that those insurance companies that stand to benefit the most from insurance litigation reform should bear the burden of most of the funding. These are the insurers that are facing mounting problems today from Superfund liability claims. So principle number one: Those insurers that benefit the most should pay the most.

The second principle is that a broader segment of society will also benefit from the insurance reform effort. Policyholders will benefit from reduced litigation; the rest of the insurance industry will benefit if their brethren remain solvent, and society will benefit from the reduced cost of litigation and quicker cleanup of sites. So we feel that those who will benefit some from the reform should pay some of the funding.

The third principle is that both insurers and reinsurers should participate in financing the Fund because they all benefit from reform.

For the same reason, the fourth principle is that foreign insurers and reinsurers should also participate in the funding.

Given those four principles we reached what we believed is a reasonable financing approach for the Fund. Under the proposal, 70 percent of the funding would come from a retrospective fee on insurers that wrote commercial coverage before 1986 from which Superfund claims could arise; 30 percent of the funding would come from a prospective fee on insurers that write commercial liability insurance after the date of enactment.

The retrospective fee provides 70 percent of the financing and is consistent with our first principle that those insurers that benefit the most from reform should pay most for reform. This fee focuses on what insurance companies did in the past.

The mechanics will work like this: An insurer would add up the net premiums that it wrote or reinsured for the 15 years from 1971 through 1985 for two types of commercial insurance coverage, commercial multiple peril liability and comprehensive general liability.

These are the types of coverage from which most of the Superfund claims arise. Inflation adjustments would state the premiums in comparable 1985 dollars.

From these 1971 through 1985 inflation-adjusted premiums, the insurer would exclude $50 million of premiums. This exclusion provides relief for small insurers.

The insurer would then multiply the resulting base period amount by two-tenths of 1 percent, and the result would be the insurer's retrospective fee that it would pay each year for the next 2 years. The rate would increase to 0.27 percent for each of the following 3 years because the funding needs over the 5 years are not level.

Also, the Secretary of the Treasury would have the authority to adjust the rates to make sure that the expected revenues are collected.

Upon payment of this retrospective fee and with the rest of the reform package, insurers that wrote significant commercial business from 1971 through 1985 would be relieved of uncertainty with respect to both the amount and timing of the litigation costs and the liabilities.

Let me note that if the liability for Superfund claims were fully recorded on the insurer's financial statements and if 88 cents of every $1 they spend on litigation is substantially reduced, the proposal should have a positive financial impact on those insurers. However, many insurers have not fully recorded the potential exposure to environmental claims or the anticipated litigation costs. But if this reform doesn't happen, it probably won't be long before these insurers will be required to include these potential Superfund liabilities on their financial statements.

Our proposal uses historic premiums as a proxy for potential liability. While some commercial coverage may not appear to give rise to Superfund claims, we all know that an insurer can be sued and have to incur costs to defend itself, regardless of whether the suit has merit. So we believe that the premium proxy with a $50 million deductible represents a reasonable connection between an insurer and potential Superfund liability.

Our proposal also contains a prospective fee consistent with our second principle that everyone benefits somewhat from the reform and so everyone should pay something for the reform.

Consequently, approximately 30 percent of the financing would be paid by insurers writing commercial insurance in the future. An assessment of 0.34 percent, less than half of a penny, of each direct premium dollar written for certain commercial coverage for the 2 years after enactment, would go to finance the Fund. This rate would increase to 0.44 percent in the following 3 years.

We anticipate that, over time, it is likely that most of this prospective fee would be passed through to policyholders. Insurers would certainly try to pass it through as a cost of doing business. Thus, this 30 percent portion of the financing would be spread broadly among insurers, the policyholders and society.

Now, I would like to describe how alien insurers participate in the financing of the proposal. With respect to the proposed 70 percent portion of the funding, an alien insurer would be subject to a fee of one-half of 1 percent based on the amount of risk it assumes

under each casualty insurance contract it writes. It is a fee imposed on an insurer's assumed risk under the policy rather than the premium paid.

To avoid paying this risk-based fee on all casualty contracts written, the alien insurer could elect to pay the same retrospective fee that I described earlier. The alien insurer would execute a closing agreement with the Internal Revenue Service under which it would agree to pay the retrospective fee.

The computation of the retrospective fee could be more difficult for an alien insurer since 1971 to 1985 premium data may or may not be readily available. So it is useful that the insurer can sit down with the Internal Revenue Service and come to a reasonable agreement on the amount of the insurer's historic premium base.

Until the closing agreement is executed, the insurer would remain subject to the risk-based fee. This results in a timing problem which can be resolved in various ways. We will work with the committee to develop reasonable solutions to this issue.

For 30 percent of the financing alien insurers would pay exactly the same prospective fee, the 0.34 percent of premium fee, as all domestic and foreign insurers and reinsurers.

In summary, our proposal is based on the principles I stated. That is, insurers that stand to benefit the most from reform would pay the most. A broader segment of society that stands to benefit somewhat by reform would pay something for reform. And insurers and reinsurers, both domestic and foreign, would participate in the financing of the reform.

There is considerable disagreement within the insurance industry about how the financing package should be structured. Some insurers argue that the funding mechanism should be entirely prospective and others argue that the funding should be entirely retrospective. There are many variations somewhere in between.

We believe that our proposal represents one approach and strikes a reasonable balance between those opposing views, and this approach could also apply to the extended term of the Fund. Moreover, the proposal provides a stable and predictable revenue source which is not likely to erode over time.

However, let me state that the administration is wholeheartedly supportive of the need for Superfund reform, and we recognize that our proposal is but one approach out of many possible approaches. The financing of the Fund should not stand in the way of moving the reform process forward.

We would encourage the committee to keep in mind the very significant benefits to our country from the reform process and not let the financing become an obstacle. Provided that the Fund is adequately financed over its term, the Fund can accomplish the goal of reducing very wasteful litigation.

Mr. Chairman, this concludes my statement. Secretary Munnell and I will be pleased to answer any questions you and members of the committee may have.

Acting Chairman GIBBONS. Thank you.

[The prepared statement follows:]

STATEMENT OF
LESLIE B. SAMUELS
ASSISTANT SECRETARY (TAX POLICY)
DEPARTMENT OF THE TREASURY
BEFORE THE
HOUSE COMMITTEE ON WAYS AND MEANS

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the Administration's proposals for funding the reauthorization and amendment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) contained in the Superfund Reform Act of 1994 (H.R. 3800). CERCLA created the Superfund program, which is the Federal government's primary program for addressing dangerous environmental and health conditions created by the release of hazardous substances into the environment.

Before describing the specific financing elements connected with the Administration's proposal and the rationale behind them, I would like to give a brief overview of the Superfund reform legislation and the state of affairs under current law.

CURRENT LAW

Superfund Trust Fund

CERCLA provides the Federal government with the authority to respond to and clean up releases of hazardous substances into the environment. Under CERCLA, the Environmental Protection Agency (EPA) has two tools for cleaning up hazardous waste sites. First, EPA can take legal action to force responsible parties to clean up contaminated sites or to reimburse the Federal government for the cost of the cleanup. Second, EPA can use funds in the Hazardous Substance Superfund trust fund to finance the cleanup of hazardous waste sites where a responsible party cannot be found or is not financially viable (orphaned sites). The trust fund can also be tapped to expedite the cleanup of other sites where costs will ultimately be recovered from potentially responsible parties (PRPs).

The Superfund trust fund is currently financed primarily by excise taxes on domestic crude oil, imported petroleum products, certain chemicals and imported derivative products, a corporate environmental tax, and annual appropriations from general revenues. More specifically, the trust fund is financed by the following taxes: (1) an excise tax on crude oil and imported petroleum products equal to 9.7 cents per barrel for domestic crude oil received at a United States refinery or exported, on imported crude oil, and imported petroleum products entered into the United States for consumption, use, or warehousing; (2) excise taxes imposed on listed chemicals sold domestically or used by the manufacturer, producer, or importer of the listed chemicals at rates ranging from $0.22 to $4.87 per ton; (3) excise taxes on certain imported derivative products generally at rates applicable to taxable chemicals used as materials in the manufacture of the imported substances; and (4) the corporate environmental tax equal to 0.12 percent of modified alternative minimum taxable income in excess of $2 million.

These taxes are scheduled to expire on December 31, 1995. However, the taxes may terminate earlier if amounts in the Superfund trust fund reach certain levels. The Superfund taxes may expire before January 1, 1996 if (1) on December 31, 1994, the unobligated balance in the Superfund exceeds $3.5 billion and will exceed $3.5 billion at the end of the following year if no Superfund taxes were imposed during the year, or (2) if the amount of cumulative Superfund taxes collected exceeds $11.97 billion.

The Superfund taxes provide an adequate and stable source of funds for the trust fund. In enacting CERCLA, Congress decided that the cleanup costs incurred by the Federal government where a private party could not be identified or was not financially viable should be paid by current producers and users of hazardous substances. By taxing the materials used to make hazardous products and waste, these costs would be borne by persons producing or using hazardous materials. Accordingly, Congress enacted the excise taxes on petroleum and chemicals.

Under the Superfund Amendments and Reauthorization Act of 1986, Congress decided to expand the Superfund financing sources to include the corporate environmental tax. The addition of this broad-based funding source reflected the view that the production and use of hazardous substances and the benefits from cleanup were widely dispersed.

Litigation

CERCLA imposes liability for cleanup costs on current owners and operators of disposal sites, owners and operators at the time of a release, and generators and transporters of hazardous substances. Responsible parties are subject to strict, joint, and several liability standards with respect to costs associated with the removal and cleanup of hazardous substances. This liability system currently generates a significant amount of litigation for recoveries between EPA and PRPs (enforcement litigation), between initially identified PRPs and other PRPs (contribution litigation), and PRPs and their insurers (insurance litigation). As a result, litigation costs have been and continue to be significant.

Insurers that wrote commercial liability and comprehensive general liability coverage prior to January 1, 1986 sometimes have to pay claims related to a policyholder's liability for cleanup costs, either because the insurance contracts specifically included coverage for environmental liability losses or the judicial system determines that the insurer is liable under the terms of the insurance contract for cleanup costs incurred by the policyholder. The costs incurred by PRPs and insurers in insurance litigation are significant. That money would be better spent cleaning up hazardous waste sites.

OVERVIEW OF PROPOSED LEGISLATION

Superfund Trust Fund

H.R. 3800 contains reform initiatives that fulfill the Administration's commitment to protecting human health and the environment and to making Superfund cleanups faster, fairer, and more efficient. It is our belief that the provisions of H.R. 3800 provide an adequate, stable, and equitable financial base for the Superfund.

H.R. 3800 would reauthorize the Superfund program at $9.6 billion for the five year period beginning October 1, 1994 and ending September 30, 1999. The legislation would extend the existing Superfund taxes for five years and would authorize the present level of appropriations from general revenues for the Superfund ($250 million per year for FY 1995 through FY 1999).

The present excise taxes and the corporate environmental tax would be extended until December 31, 2000. No changes are proposed in the present tax rates or taxable substances. However, subsequent to the introduction of the bill we transmitted certain technical amendments that would increase the ceiling on total Superfund taxes that can be collected without causing the taxes to cease from $11.97 billion to $22 billion. This increase in the ceiling should permit the reauthorized taxes to be collected; otherwise the taxes could terminate prematurely when the lower ceiling is hit.

Litigation

Title VIII of H.R. 3800 is designed to reduce the costly litigation between potentially responsible parties (PRPs) and their insurers. A new Environmental Insurance Resolution Fund (EIRF) would be established with the objective of facilitating settlement of the vast majority of litigation involving insurance claims related to Superfund or environmental liability.

Under present law, protracted disputes between insurance companies and their policyholders regarding the applicability of coverage to liability under CERCLA are a major source of litigation related to Superfund. The legislation will reduce this litigation and allow monies that would otherwise be spent in adversarial proceedings to be used for cleanup.

The EIRF would make a single, comprehensive offer to each eligible responsible party to resolve all pending and future claims of the policyholder against its insurers arising under the Superfund law for eligible costs of the policyholder. A policyholder that accepted the EIRF's offer would be reimbursed at a fixed percentage of its eligible costs and would be required to waive all current and future CERCLA-related claims against its insurers. If a policyholder rejects the EIRF's offer, the EIRF would reimburse insurers for litigation costs and judgement amounts associated with any litigation brought by that policyholder, up to the amount of the offer.

The EIRF would be financed by fees and assessments imposed on insurance companies. The Administration's funding proposal for the EIRF is designed to raise $3.1 billion over five years, consistent with the terms of the Administration's original reform proposal. Apart from H.R. 3800, the Administration separately transmitted the statutory language for these fees and assessments which would become part of Title IX of H.R. 3800. In H.R. 3800, the term of the reform proposal was extended beyond five years.

Now, I would like to describe the Administration's proposed financing mechanism for the EIRF and the rationale behind it.

OVERVIEW OF ENVIRONMENTAL INSURANCE RESOLUTION REFORM FUNDING

The EIRF would make and fund settlement offers with certain policyholders. It would serve to streamline and facilitate settlements for litigation between two private parties--an insurer and its policyholder. The parties to this environmental insurance resolution reform directly benefit from the reform. Accordingly, insurers and their policyholders should finance the environmental insurance resolution reform.

On this basis, we developed three guiding principles that serve as the foundation for the Administration's financing proposal for the EIRF. Once you understand the principles upon which we developed the financing mechanism, the mechanism itself becomes more easily understood.

The fundamental principles are: (1) insurers that benefit from the environmental insurance resolution reform--those that have potential Superfund liabilities through commercial insurance coverage written in the past--should provide most of the EIRF's funding; (2) commercial insurance industry as a whole, its policyholders, and society also will benefit from the reform and should pay some portion of the EIRF's funding; and (3) all commercial insurers and reinsurers, whether domestic or foreign, that insure risks in the United States benefit from the reform and should participate in its funding.

Consistent with the first principle that insurers that benefit from reform should pay for reform, under the Administration's proposal, approximately 70 percent of the financing for the EIRF would be paid by those insurance companies that wrote certain commercial liability coverage in the past. An "environmental insurance resolution fee" or "retrospective fee" would be imposed on net premiums written by domestic and foreign insurers and reinsurers for contracts insuring certain U.S. commercial liability risk during the period from 1971 through 1985.

We believe that the base period of 1971 through 1985 is a reasonable way to approach the determination of the retrospective fee base. Any insurer or reinsurer that wrote coverage for losses arising from comprehensive general liability or commercial multiperil liability risks situated in the United States prior to January 1, 1986 has potential exposure to environmental liability claims as policyholders discover that they are PRPs. This exposure generally ceased beginning January 1, 1986, because insurers began including in their insurance contracts a specific exclusion for coverage of claims related to environmental liability. For coverage written prior to 1986, we could not look back indefinitely. Publicly available data prior to 1971 are less reliable and so the base period for determining this retrospective fee would begin in 1971.

Consistent with the second principle that the entire insurance industry, policyholders, and society benefit from reform, approximately 30 percent of the EIRF's funds would be paid based on commercial insurance to be written and purchased in the future. Under the proposal, this 30 percent of the EIRF would be funded through an "environmental resolution insurance assessment" or "prospective fee" on premiums from certain commercial insurance of U.S. risks currently written by domestic and foreign insurers. Reinsurers would not require a direct assessment because insurers would reflect their assessments in pricing adjustments in reinsurance contracts.

A fee imposed on future premiums written by insurers of commercial liability coverage has merit in funding a portion of the EIRF. The health of the industry would be improved by environmental insurance resolution reform and the potential for state guaranty fund involvement would be reduced. If insurance companies liable for environmental claims become insolvent, State guaranty funds can assess solvent insurers to pay outstanding policyholder claims of insolvent insurers. Thus, all commercial insurers (and their policyholders) may ultimately benefit from the proposed reform, regardless of whether an insurer wrote coverage that directly generates environmental exposure. Also, given the likelihood that a substantial part of fees on future premiums being passed through to policyholders in pricing, the fee is borne more generally by consumers of the insurance coverage. For these reasons, a portion of the financing should be provided by insurers writing commercial coverage today.

Consistent with the third principle, that all insurers and reinsurers should participate in the EIRF funding, the Administration's proposal requires foreign insurers and reinsurers to

contribute their fair share. Foreign insurers and reinsurers that are currently subject to net-basis U.S. income taxation would pay the retrospective fee on the same basis as would domestic insurers and reinsurers. Alien insurers and reinsurers (i.e., foreign insurers that are not subject to net-basis U.S. income taxation) would be required to participate in the EIRF funding in a different manner. To ensure that alien insurers and reinsurers contribute to the EIRF, their U.S. insurance contracts would be subject to a prospective fee, collected by a U.S. withholding agent, in lieu of the retrospective fee. Alternatively, an alien insurer or reinsurer could elect to be subject to the retrospective fee by entering into a closing agreement with the Internal Revenue Service.

Both foreign and alien insurers would pay the prospective fee imposed on future commercial insurance premiums on the same basis as domestic insurers. In the case of alien insurers, that fee would be collected by a U.S. withholding agent.

FUNDING SPECIFICS OF ENVIRONMENTAL INSURANCE RESOLUTION REFORM

Environmental Insurance Resolution Fee (Retrospective Fee)

The retrospective fee is designed to raise $2.17 billion or 70% of the funding during the first five years of the EIRF. It would be determined by multiplying a fee funding rate by the adjusted base-period commercial premiums written for contracts or agreements providing insurance and reinsurance with respect to qualified commercial coverage of U.S. risks during the period beginning January 1, 1971, and ending on December 31, 1985. The proposed fee funding rate would be 0.20 percent for the first two years and .27 percent for the next three years. The Secretary of the Treasury would have the authority to adjust the rates should actual collections differ from anticipated collections.

1. Adjusted base-period commercial premiums. In determining the total adjusted base-period commercial premiums written for 1971 through 1985 to which the funding rate is applied, the net premiums written for each year during the period for qualified commercial insurance contracts and reinsurance of qualified commercial insurance coverage would be adjusted by an inflation factor based on the consumer price index. This inflation adjustment would restate all premiums written to 1985 dollars so that they are taxed on a comparable basis.

To provide relief to small insurers and mitigate any mistargeting of the premiums proxy, $50 million would be excludable from inflation-adjusted base-period commercial premiums.

2. Net premiums written for qualified commercial insurance contracts. Net premiums written for qualified commercial insurance contracts means net premiums written for contracts providing insurance of qualified commercial coverage of U.S. situs risks generally computed on the basis of the annual statements approved by the National Association of Insurance Commissioners (NAIC).

Qualified commercial coverage means insurance coverage that was, or should have been, characterized in the NAIC annual statement as "commercial multiple peril" or "other liability" lines of business. However, contracts included in the "other liability" line of business that insured only specific coverages unrelated to general commercial liability, and thus would not generate exposure to environmental insurance claims, would be excluded. For example, medical malpractice insurance would be an excludable coverage.

3. Net premiums written for allocated reinsurance of qualified commercial coverage. Premiums related to allocated reinsurance (i.e., generally first dollar pro rata reinsurance) are identified by line of business. Accordingly, net premiums written for allocated reinsurance of qualified commercial coverage means net premiums written for reinsurance which were reported (or, in the case of a company not filing an annual statement, would have been required to be so reported) on the annual statement approved by the NAIC by the line of business related to the underlying policies covered by such reinsurance, rather than on the reinsurance line of business of the annual statement.

4. Net premiums written for unallocated reinsurance of qualified commercial coverage. For certain reinsurance coverage (e.g., reinsurance in excess of a retention by the ceding company), the reinsurer may not have separately reported net premiums written by line of business on the annual statement. In addition, the reinsurer often cannot easily identify or directly trace the type of insurance coverage to which the premiums relate because several types of insurance coverage could be combined in the reinsurance agreement. Thus, the net premiums written for this unallocated reinsurance would be determined using a formula, or proxy approach, based on the insurance industry's ceded premiums for qualified commercial coverage from January 1, 1971, through December 31, 1985.

To derive the net premiums written related to unallocated reinsurance of qualified commercial coverage, a reinsurance ratio of 21 percent (or otherwise as determined by the Secretary) would be multiplied by the net premiums written, as reported on the NAIC annual statement (or equivalent computational basis if an NAIC annual statement was not prepared) for the reinsurance line of business.

5. Foreign insurers and reinsurers. Foreign persons (including foreign companies, partnerships, trusts, and estates and nonresident alien individuals) that insure or reinsure U.S. risks would be subject to the retrospective fee if they are currently engaged in any trade or business within the United States and their taxable income that is effectively connected with that trade or business is subject to net-basis U.S. income taxation and is not exempt by treaty from such taxation. The retrospective fee would be computed in the same manner as for U.S. insurers and reinsurers.

All other foreign insurers and reinsurers ("alien insurers and reinsurers") would be subject to a prospective withholding fee in lieu of the retrospective fee, unless they elect to be subject to the retrospective fee instead. This prospective withholding fee would be imposed at a rate of 0.50 percent of the maximum limit of liability on each policy of casualty insurance covering U.S. risks and on each policy of reinsurance with respect to such an insurance policy. The fee would be imposed on all lines of casualty business, broadly defined, to prevent alien insurers and reinsurers from avoiding the fee simply by ceasing to write qualified commercial insurance coverage in the United States. The fee would be withheld and remitted to the Internal Revenue Service by the U.S. premium payor or other U.S. withholding agent.

Alternatively, alien insurers and reinsurers could elect to be subject to the retrospective fee. If such an election were made, the retrospective fee would apply in the same manner as it applies to U.S. insurers and reinsurers (and to other foreign insurers and reinsurers). Electing aliens would be required to enter into a closing agreement with the Internal Revenue Service to ensure collection of the retrospective fee.

6. Exemptions. A company would not have a liability for the environmental insurance resolution fee if it had no more than $50 million of total net premiums written, adjusted for inflation, from January 1, 1971 through December 31, 1985 for qualified commercial coverage. In addition, companies that could demonstrate to the IRS that they have no potential exposure to claims for environmental liability based on the type of "other liability" insurance contracts written or reinsured during 1971 through 1985 (such as medical malpractice and insurance agents' and brokers' liability risks) would not be subject to the fee. This demonstration does not relate to whether the insurer believes that its commercial liability insurance contracts excluded coverage of environmental liabilities.

7. Subsequent adjustment of factors. Any adjustments to the funding rate or the reinsurance ratio would be applied prospectively in the computation of a company's EIRF. Adjustments may be required because of the uncertain application of the premium and coverage exclusions, or because of insufficient collections due to other unanticipated factors.

8. Corporate reorganizations. Special rules designed to prevent erosion of the retrospective fee base are also provided to ensure that the fee follows the commercial insurance business of a company in any corporate reorganization involving an acquisition or disposition of all, or a part, of a company's commercial insurance business. Rules also address movement of the fee in assumption reinsurance transactions.

If after December 31, 1985, but prior to February 2, 1994, an insurer disposed of qualified commercial policies, through an assumption reinsurance transaction whereby the reinsurer became directly liable to policyholders on the contracts transferred, the insurer would be permitted to reduce its commercial net premiums for purposes of computing the retrospective fee. The amount of reduction would equal the commercial net premiums generated from 1971 through 1985 by the related to the transferred insurance business, provided that the insurer reports the amount of such commercial net premiums to the reinsurer and the reinsurer includes such premiums in its base-period premiums.

Any reinsurance of qualified commercial policies on or after February 2, 1994, and any reinsurance of qualified commercial policies after December 31, 1985, and before February 2, 1994, other than that just described, would be disregarded for purposes of computing the retrospective fee.

If after January 1, 1971 but prior to February 2, 1994, a reinsurance agreement covering qualified commercial policies was terminated in accordance with a commutation agreement whereby the reinsurer is no longer liable for any potential claim under the contract, the reinsurer would be permitted to reduce its commercial net premiums for purposes of computing the fee. The amount of reduction would equal the commercial net

premiums generated from 1971 through 1985 by the reinsured insurance business, provided that the reinsurer reports the amount of such commercial net premiums to the ceding person and the ceding person includes such premiums in its base-period premiums.

Any reinsurance (other than reinsurance that was commuted) during the base period from 1971 through 1985 would generally not require separate adjustment. The premiums related to such reinsurance would be reflected in the annual statement so that both the ceding and assuming person's commercial net premiums would adjust automatically.

B. Environmental Insurance Resolution Assessment (Prospective Fee)

The prospective fee is designed to raise $.93 billion or 30% of the funding during the first five years of the EIRF. It would be determined by multiplying an assessment funding rate of 0.34 percent for the first 2 years, and 0.44 percent for the following 3 years, by an insurer's direct premiums written for commercial insurance contracts. The Secretary could adjust the rates should actual assessment collections differ from those anticipated.

The assessment would apply in the same manner with respect to commercial insurance contracts written by foreign insurers of U.S. risks. It would be collected through withholding in the case of alien insurers.

Direct premiums written for commercial insurance contracts means gross premiums written and other consideration for contracts providing insurance of commercial coverage. Gross premiums written would be computed on the basis of the annual statement approved by the NAIC or on an equivalent basis.

Commercial coverage means insurance coverage that is, or would be categorized in the NAIC annual statement as "commercial multiple peril," "fire," "product liability," or "other liability" lines of business. However, contracts that insure only certain types of coverage unrelated to commercial liability included in the "product liability" or "other liability" lines of business would be excludable.

This fee would be imposed directly on primary insurers. We anticipate that the primary insurers would attempt to adjust reinsurance premiums to recoup this fee as reinsurers would pay the fee to the primary insurers as part of their reinsurance premiums.

C. Tax Exemption

The EIRF would be exempt from Federal income tax under Section 501.

Summary

To summarize the policy rationale, the Administration's funding proposal for the EIRF satisfies the three principles discussed earlier. It would require insurers that would benefit the most from the environmental insurance resolution to provide 70 percent of the funding. This 70 percent of the funding would be obtained from a "retrospective" fee imposed on premiums from commercial insurance written in the past--the policies with potential environmental liability exposure. Since it is not possible to target this fee precisely at those insurers with actual environmental liability exposure, the proposal provides relief by providing an exclusion for $50 million of premiums, and an exclusion for certain types of coverage that have no potential exposure to environmental liability claims.

Insurers are unlikely to be able to adjust fully the prices charged to policyholders to pass through the retrospective fee. Since the property/casualty insurance market is competitive and insurers provide essentially the same product, the market price for new policies will be determined by insurers that are not subject to the retrospective fee. The retrospective fee will likely reduce profits of insurers subject to the fee and be borne largely by their current shareholders, who also bear the cost of environmental liability claims and litigation costs associated with these claims.

A smaller portion (30 percent) of the funding is more broadly based and is obtained from a "prospective" assessment on future commercial insurance business. Since all commercial insurance business would be subject to this fee, the fee would be likely included in the prices charged to commercial policyholders, and ultimately, in prices charged to their consumers. This result is appropriate because those policyholders and society generally benefit from the reform and the improved financial health of the insurance industry that would result from the proposed reform.

The proposal would provide that both insurers and reinsurers pay the fee. Reinsurers would compute the retrospective fee on the same basis as primary insurers. The prospective fee is imposed directly on primary insurers; however, primary insurers would likely adjust insurance premiums to reflect the prospective fee. Thus, reinsurers will pay the fee to the primary insurers though premium adjustments and the primary insurers would pay the fee to the government directly.

The proposal would also ensure that foreign insurers and reinsurers that benefit from the proposed reform participate in its funding. The only way a foreign insurer could avoid providing funds for the EIRF would be for the insurer to cease writing all types of property/casualty insurance coverage in the United States. We believe that this is highly unlikely, given the importance of the U.S. market.

CONCLUSION

There is considerable disagreement within the insurance industry about how the funding for the EIRF should be structured. Some insurers argue that the funding mechanism should be entirely retrospective, i.e., based on commercial insurance business written in the past. Others argue that the funding should be entirely prospective, i.e., based on commercial insurance business written in the future. We believe that our proposal is one reasonable way to strike a balance between those opposing views--70 percent from a retrospective fee and 30 percent from a prospective fee. Moreover, the proposal provides for a stable and predictable revenue source which is not likely to erode over time.

The Congress may wish to work with representatives of the industry to design a different financing mechanism for the EIRF and its extended term. We believe that passing the Superfund reauthorization legislation this year is crucial. Provided that the EIRF is adequately funded over its term, we do not want the proposed 70 percent/30 percent funding split for the EIRF to stand in the way of the goal of reducing wasteful litigation.

Mr. Chairman, thank you for the opportunity to address this Committee. I will be pleased to answer any questions you or other members of the Committee may have.

Acting Chairman GIBBONS. Let me explain to the committee Members how we are going to run this. We are operating under the committee rules, and we will each have the light on for 5 minutes. Because of the number of us here this morning, I think we will probably go back through, again, maybe the same route to ask followup questions.

But I will take my 5 minutes, and then we will go down the list of people who should be recognized, and then we can come back for a second or third round of questioning if you want to.

First, Ms. Munnell, how confident are you that the amounts that have been estimated as needed to finance the Fund are accurate? Is there any danger that the Fund could require a relatively large premium tax rate increase in the future?

Ms. MUNNELL. Treasury has looked at these costs very carefully, Mr. Chairman, and we are fairly well convinced that the amount of money coming into the Fund will be, according to our estimates, more than adequate.

Basically, there are $2 billion of private sector costs. The Fund has to pay off roughly 40 percent. That gets you down to roughly 800 million per year before you have any improvement or cost savings due to improved remedy selection.

We put in some buffer for natural resource damage costs, and we also pay off past costs in this program. But when you add it all up, we think that the money coming into the Fund will more than cover the outlays required by the Fund.

Acting Chairman GIBBONS. Now, as I understand it, as drafted, the obligations of the Fund are not guaranteed by the Federal Government, nor does the fund have authority to borrow; is that correct?

Ms. MUNNELL. That is correct, Mr. Chairman.

Acting Chairman GIBBONS. Some groups have argued that the Fund needs the borrowing authority to operate. Wouldn't such agreements put the full faith and credit of the Federal Government at risk?

Ms. MUNNELL. We discussed borrowing, and we thought that the disadvantages much more than exceed the advantages. I think the Fund can operate without the borrowing authority.

Acting Chairman GIBBONS. It is my understanding that the extension of Superfund taxes will now be funding a new component of the Superfund program, the so-called orphan share. Could you explain the rationale for this new Government obligation?

Ms. MUNNELL. As I said in my prepared this testimony, this program will work if people are allocated their fair share of the costs.

At any site there is some pollution that is attributable to people who are no longer in business. The notion was that the fairest thing to do would be to have the Government pick up that portion of the cost. That portion of the cost will be financed out of the extension of the corporate environmental income tax, and that money will be part of the made available as part of the reauthorization.

Acting Chairman GIBBONS. Mr. Samuels, I really have trouble with the retrospective or retroactive impact of your tax proposal. Would you go over for me again your justification for going back as far as you did and for the dates that you put in there?

Mr. SAMUELS. Mr. Chairman, we carefully looked at the existing situation in the insurance industry, and if we do nothing the insurance industry that wrote policies prior to 1986 will be subject to costs and liabilities that at the moment are uncertain in time and amount.

Our proposal is, basically, to say to the group that is subject to this uncertainty that they are trading their uncertainty as to time and amount for certainty as to time and amount through the retrospective tax. If we do nothing, these insurers that are subject to this liability will be paying over time and be subject to these contingent liabilities, so what we are basically saying to them is we can look back, look at your situation, and we used this retrospective fee as a proxy to establish amounts that are fixed in amount and time.

Acting Chairman GIBBONS. It is an awful long way to go back. 1971? Is that how far back you go?

Mr. SAMUELS. Our proposal would go back to 1971. I think that some of the liabilities that the insurance industry has goes back beyond that. And we felt that going back to 1971 was a fair way to look at the problem. That is when the data was good.

But if you ask the insurance industry that is subject to these problems, I think that some of them will say that some of the suits that have been filed against them go back for policies written way before that. We didn't feel it was appropriate to go back that far because we were concerned about the reliability of the data before 1971.

Acting Chairman GIBBONS. Mr. Pickle.

Mr. PICKLE. Thank you, Mr. Chairman.

First, Ms. Munnell, under the proposal, the allocator or the mediator will be appointed to make an allocation of the costs for all of the cleanup. I assume we would do that in an attempt to try to move forward. What is going to be different next year or whenever this thing goes into effect than what has happened in the past? Will the mediator have certain divine rights that he can just put this into effect?

Ms. MUNNELL. Mr. Pickle, my understanding of how the current system works is as follows: Under joint and several liability, a company that is responsible for any portion of the pollution can be held responsible for the entire thing. Therefore, EPA can go out and identify a single PRP that has deep pockets and say, that is your mess. The PRP then has every incentive to turn around and sue everybody in sight—if anybody has ever delivered a pizza box there—in order to share this cost.

That is a very different setup from what is proposed in the legislation. In the legislation, the EPA would go out and bring in all the PRPs simultaneously. They would then all sit at a table where a mediator would determine what share of the pollution each party was responsible for.

As we discussed earlier, there are a lot of carrots and sticks that will provide incentives for the parties to sign on to the allocation process.

Mr. PICKLE. Now, we were hopeful then that the parties will agree that this is fair.

Ms. MUNNELL. Right.

Mr. PICKLE. Everybody wants to be fair.

Ms. MUNNELL. Right.

Mr. PICKLE. But out of 10 different companies that are going to clean up a site, two of them are going to say that is not fair. What happens then?

Ms. MUNNELL. EPA can sue those companies.

Mr. PICKLE. Say that again?

Ms. MUNNELL. EPA can then sue those companies.

Mr. PICKLE. Will EPA sue those companies?

Ms. MUNNELL. My assumption is yes.

Mr. PICKLE. I would like to have it on the record. If they do not agree EPA will immediately sue to try to settle this thing. I want it on the record that they will do this.

Ms. MUNNELL. We are being joined by people from EPA.

Mr. ROBERTSON. My name is Peter Robertson, Deputy Assistant Administrator, the Office of Solid Waste and Emergency Response. And with me from the Waste Program Enforcement Office is Bruce Diamond.

And I can assure you that while we hope and expect that this allocation process with its carrots and sticks will bring people to the table because they will want to voluntarily settle for their fair share, EPA is not going to be shy about pursuing people, the recalcitrant operators, that refuse to settle under what we feel is a fair process.

Mr. PICKLE. I am encouraged that that is your intent, but I don't trust you per se. I hope that we put it in the law that it is required because you must get the action under way, and I want to be sure that this will happen.

Mr. MCDERMOTT. Mr. Pickle, would you yield for clarification?

Mr. PICKLE. Yes, briefly.

Mr. MCDERMOTT. When EPA goes to sue, will the question of liability be on the table? Or will that have already been moot point by the fact that they have gone to the mediation?

Mr. ROBERTSON. The question of liability would still be an open issue at that litigation.

Mr. MCDERMOTT. It could go all the way back to square 1?

Mr. ROBERTSON. We have to establish that they are liable parties before the extent of the liability.

Mr. MCDERMOTT. If he gets through the mediation process and if they don't like what they get, they go back to the beginning? It is de novo?

Mr. ROBERTSON. We have some disincentives that we hope would encourage them not to do that. If they are recalcitrant parties and they elect not to settle on their allocated share, they can be held jointly and severally liable for the full amount of the remaining and they can be held liable for the orphan share, for that pollution that is attributable to parties that are no longer in business, et cetera.

Mr. PICKLE. I am glad to hear EPA say that they will pursue this matter until they get it settled. We have got to recognize that, once it gets into court, it can go on for a year or two. We don't know how long that will be, and you have got to get at it immediately.

Now, with respect to EPA and to the others, I want to raise this additional question. You say you have gotten the parties together,

and I understand this agreement has been proposed primarily by the insurance companies with respect to the Fund that you referred to.

Ms. MUNNELL. There are two separate liability allocation processes here: One, you have the allocation process itself where you try figure out each party's fair share of the pollution. After the parties have their allocation, they then can go over to the Resolution Fund window and find out what their payoff rate would be from the Fund. And that Fund is financed by the insurance companies.

Mr. PICKLE. I hear your procedure on it, and I don't want to take my time—but I yielded for just a minute. I want to know, has the environmental community agreed to this general procedure that have you outlined?

Ms. MUNNELL. This bill is supported broadly. It is supported by the insurer, by the polluting parties, by environmentalists, by community groups. It has a broad base of support.

Mr. PICKLE. I hear you. How do I know that?

Ms. MUNNELL. We actually have letters.

Mr. PICKLE. I want to ask the insurance people—for instance, on the Fund, I understand the Environmental Fund won't go into effect until 85 percent of the companies agree. When are they going to get that agreement?

In the meantime, We are going to start a tax 6 months before there is agreement. And if it doesn't work then we have to pay it back. That is kind of crazy.

So I want to know, does the insurance companies approve of this? Do the environmentalists approve? Do they give us the stamp of approval on the program that you have advanced here today? And that is what I am going to be asking and trying to find out in this hearing.

Acting Chairman GIBBONS. Mr. Houghton.

Mr. HOUGHTON. Thank you, Mr. Chairman.

I just would like to check, Dr. Munnell, with some of the arithmetic. If I understand correctly, you are going to raise approximately $40 billion. You raise that from corporate environmental income taxes, chemical companies, petroleum companies and general revenue appropriations. And that is roughly over a 10-year period.

And then, if I understand, that $40 billion will be enough to take care of the costs of the cleanup process on the part of the Government. I just want to get a fix on that.

To take another bearing on that, in your testimony you said most observers envision an eventual number of 3,000—contrasted to the 1,300—and cost estimates are running as high as $150 to $300 billion.

So let's say that is over a 30-year period. And I am making some assumptions here, but based on a 10-year period, the cost would be $100 billion. And then you say that the Government takes about 40 percent of the cost. Is that right?

Ms. MUNNELL. I am sorry. When I answered the chairman's question I was focusing on the financing of the Environmental Insurance Resolution Fund specifically. And, for that, Treasury's estimates indicate that the money that will come in over the 10 years, this $8.1 billion, should be more than adequate to meet the expenditures required from the Fund.

And now, as I understand it, you are asking a broader question about all the taxes that are going to be raised, and this is—my sense was that this would be a 5-year reauthorization so that the taxes—the general taxes would be reauthorized for 5 years.

Mr. HOUGHTON. Yes, but I guess what I am driving at is this, that we are sitting here unhappy with what has happened in the past.

And, basically, there are 1,300 sites out there, and we have some $13 billion, and we have completed work on 50 of those. So if you keep that as a static figure, $40 billion, you have 1,250 remaining. If you spend $13 billion for 50 sites, how are you going to spend only $40 billion for 1,250 sites? And I don't know how the arithmetic works out.

What we are trying to do is not only to understand it and create the right legislation, but we just don't want to be sitting here in the year 2000 or the year 2003, saying, gosh, we missed it again. We just didn't know what we wanted to do. That is what I am trying to hone in on.

Ms. MUNNELL. Mr. Houghton, I think the most important piece of this legislation for everyone is the changes in the cleanup standards. And if we can cleanup to more reasonable levels, we will be able to save a lot of money. Our estimates of those savings should be somewhere between 20 to 25 percent of the cleanup costs. And, as you know, the liability efforts are aimed at eliminating the litigation costs so that we should hold costs down, we should be able to speed up cleanup.

Mr. HOUGHTON. Yes, but if you say you knock 25 percent out, that still doesn't make the numbers add up.

Ms. MUNNELL. Let me get back to you for the budget outlay figures in a written response.

Mr. HOUGHTON. I really think it is important to put it in simple terms so that all can understand it. The private funds, the Government funds, what comes in, what goes out, and does it do what you want over a 10-year period. The point is, we don't want to look at our successors and say 10 years from know we kicked this thing around in the year 1994, and we swore up and down that something was going to be better and we didn't finish. This is possible since you are considering a doubling of the number of sites. So if you could get back to me, I would appreciate it.

Ms. MUNNELL. Delighted.

Acting Chairman GIBBONS. Mrs. Kennelly.

Mrs. KENNELLY. Thank you, Mr. Chairman. Mr. Samuels and Assistant Secretary Munnell, as you heard me say in my opening testimony, I had some reservations about the way the tax is structured. Earler in the year Secretary Bentsen of the Treasury, came to Connecticut to a meeting about the Superfund where he really showed a willingness to be flexible about this 70–30 split. Yet I hear Mr. Samuels' testimony, and it seems to defend 70–30, so I would just have to ask the question of you both: Have you got the same flexibility as the Secretary indicated that he would have?

Mr. SAMUELS. Mrs. Kennelly, I tried very hard in my testimony, both my oral testimony and written testimony to make it clear that our proposal is but one of many ways to solve this problem and that we are wholeheartedly committed to moving the reform proc-

ess forward, and that the financing mechanism should not be an obstacle in accomplishing that.

Mrs. KENNELLY. Mr. Samuels, I noticed that. In fact, It should not be an obstacle, but it is a good piece of the obstacle, and that is what we are trying to deal with. In fact, let me go back to something else you said.

As I have prepared for this hearing, I looked at the Office of Technology Assessment report, and they put an estimated cleanup cost on Federal sites of $500 billion to $1 trillion with the insurance industry liability estimated at $120 to $150 billion. Mr. Houghton, these are the kind of numbers we really are talking about. To give you an idea, the property casualty industry surplus in 1993 was only $42 billion. Robert Littan, who used to be with Brookings and is now of the Justice Department, has written a great deal about this. He really says that the impact of this tax, if done wrong, would have very, very serious ramifications on insurers and insurees. Then I notice in your principles, Mr. Samuels, your second principle you say one of the reasons it should be 30 percent prospective is that, obviously, those companies want to keep their brothers solvent.

I see a tension between these two things. If you do a 70 percent retroactive and you have these kind of numbers of liability, I don't think the brothers that weren't in the business when the law was written and have the new companies, want to keep their brothers solvent.

I think they are going to see themselves moving forward and their brothers being in some very deep trouble. That is why I keep harping on the fact that this 70–30 might not in the long run be the fairest answer. I just wanted to highlight that. I guess my light hasn't gone on yet.

Dr. Munnell, I have heard some people say that the lines of business in your proposal are not inclusive enough, that they could be broader. Have you got any reaction to that criticism?

Ms. MUNNELL. Actually Mr. Samuels should answer that question.

Mr. SAMUELS. This is with respect to the prospective fee or both?

Mrs. KENNELLY. Whatever it ends up.

Mr. SAMUELS. We have looked at the lines that would give rise to the claims for the pre-1986 policies, the potential claims for the pre-1986 policies, and we identified, two basic lines. I think based on our conversations with the industry, those seem to be the lines that will cover the situation, and I would add that to the extent that an insurance company can establish the part of the line, for example, there is an "other liability" line, had nothing to do with potential Superfund liability like medical malpractice or errors and omissions insurance, they can exclude that from the base. So that is not included in the base.

On the prospective fee, what we want to make sure is that we have a predictable and reliable tax base that won't erode over time. We picked what we thought was a very reasonable group of lines that would represent that base, and I have heard that some have said that they don't think that is broad enough. I think as you go through the day today you are going to hear different views on these issues, and I think that a lot of those views—and rightly so—

will depend on each company's particular position. I think as companies look at the situation, if they think a broader base will help them, then they are going to have that point of view, and I think, for example, that this same tension exists between the retrospective and the prospective, for the companies that are increasing their market share, going forward, or think they are going to increase their market share. They are all in favor of retrospective taxes. They think that is great, and the companies that are decreasing their market share because they got hurt back before 1986 and they have decided to kind of calm down in the market, they are all wanting to charge ahead with prospective taxes. I think that is what the committee is going to have to evaluate and balance—those different interests and different groups.

Mrs. KENNELLY. Well, your answer to my question, Mr. Samuels, was, yes, you have heard those concerns. Thank you, sir. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. All right, fine. Mr. Hancock.

Mr. HANCOCK. Thank you, Mr. Chairman. What is the difference between a retrospective tax and a retroactive tax?

Acting Chairman GIBBONS. Different name.

Mr. SAMUELS. I think in this particular case I think that the retrospective tax is when you have had a retrospective claim against you going back 20 years and someone comes along and says I will settle that claim on the following prospective basis: You are going to pay a certain amount computed retrospectively each year for the next 5 or 10 years out of your pocket to settle that prior claim. That is effectively what our retrospective fee proposal is. It is basically telling the people who had this exposure that we are prospectively settling that exposure in a fixed and retrospectively determinable amount over the next 5 or 10 years.

Mr. HANCOCK. I just wanted to make sure that there was a difference there. Actually, there isn't a difference, but this tax is supposed to generate approximately $8.1 billion over the next 10-year period; is that correct?

Mr. SAMUELS. The total of both the retrospective and the prospective are targeted to be——

Mr. HANCOCK. But the objective is $8.1 billion?

Mr. SAMUELS. Correct, that is the target for the next 10 years.

Mr. HANCOCK. We are talking about a retrospective tax going back to 1971. I am curious, how do you handle the income tax liability in a situation like that? Do you go back and look at the tax returns for 25 years?

Mr. SAMUELS. No, this is basically an amount to settle all these prior claims. As you make the payments, you will get a deduction.

Mr. HANCOCK. In other words, then, the payments would be deducted from future earnings?

Mr. SAMUELS. In the same way as if they settled these prior claims. Let's assume we do nothing, just assume we do absolutely nothing and we go along and the insurance industry pays 88 cents out of every $1 for litigation costs. Those 88 cents will be deducted as they go along and pay them in the same way as our retrospective fee will be deductible as it is paid.

Mr. HANCOCK. OK. What is the current financial status of the Superfund, of the trust fund? Currently. I mean, does it have a surplus or is it broke? Is there any money in the Superfund?

Ms. MUNNELL. Yes, there is about $2 billion of money in the Superfund now.

Mr. HANCOCK. About $2 billion. And I understand that the administration has considered using that money as part of their welfare package; is that correct?

Ms. MUNNELL. The administration has a proposal to finance part of welfare reform through the PAYGO surplus that is created by the extension of the corporate environmental income tax. It is really a bookkeeping provision. It has no direct effect on Superfund, either income or outlays.

Mr. HANCOCK. In other words, you don't really feel that the Superfund has a surplus in it now? It is just more or less an operating balance there; is that correct?

Ms. MUNNELL. I'm sorry?

Mr. HANCOCK. Does the Superfund have a surplus or not?

Ms. MUNNELL. They have a surplus in there now, but the funds that are being targeted for welfare reform, you gain by extending the corporate environmental income tax, which creates a surplus in the PAYGO part of the budget, which then can then be used to pay for welfare reform. The way I think about it, I don't know if this is useful to you, but basically we have all the Superfund expenditures in the baseline. We don't have the corporate environmental income tax in the baseline beyond the end of 1995.

After 1995, general revenues are currently being used to cover the Superfund expenditures. When you extend the corporate environmental income tax, it sort of frees up those general revenues which can then be used to finance welfare reform, so it is really a bookkeeping transaction.

Mr. HANCOCK. Thank you, Mr. Chairman.

Mr. PICKLE. If the gentleman would yield, it may be a bookkeeping transaction, but we want to make it plain that the $10 million from Superfund is not going to be spent for welfare?

Ms. MUNNELL. Exactly right.

Acting Chairman GIBBONS. Mr. McDermott.

Mr. MCDERMOTT. Thank you, Mr. Chairman. As somebody who represents an area where there are a number of Superfund sites identified and not very much has happened, we have more than a little interest in making this thing work, and so I think we share your concern over trying to find a mechanism that will work. It seems everybody agrees up to how to pay for it. Is that a fair assumption?

Ms. MUNNELL. I think the only area of controversy in the paying for part of the proposal pertaining to the environmental insurance resolution fund, which is really a small part of this very enormous piece of legislation, and there the controversy, as everyone has pointed out, hinges on how much of the tax on the insurance industry should be prospective and how much should be retrospective.

Mr. MCDERMOTT. So there must have been long discussions down at the Treasury about what was fair. I am sure that this was not decided over an afternoon cup of coffee, and as I look at it, I keep wondering about the whole idea, as Mr. Hancock suggests, of a ret-

rospective or whatever, retroactive tax, what kind of precedent you think you are setting by doing this, by establishing a tax going back based on activities that occurred some 15 years before.

Mr. SAMUELS. Mr. McDermott, we obviously spent a lot of time thinking about how to finance the fund, and I think that the proposal was based on the four principles that we described. The first principle is that the insurers who benefit the most from the reform——

Mr. MCDERMOTT. But have those principles ever been used in any other situation? I heard you enunciate them so I know basically what you are saying, but sometimes—I remember once or twice in my legislative career having decided what I wanted to do and then thinking up four reasons why I thought it was the best thing to do, and I want to know if those principles have been used in any other situation where you reached back that far.

Mr. SAMUELS. I am not aware that they have, but I would also say that this situation is a very unusual situation where you are basically trying to bring various parties to the table who have been involved in the morass of litigation and assist them in settling this litigation problem which is obviously not beneficial to anyone, including generally members of society. So that was the basis, and if you think of this as a situation involving the insured and the PRPs who had these contracts and now there is all the litigation about a contract between these two parties.

Mr. MCDERMOTT. Our sites still aren't cleaned up.

Mr. SAMUELS. That is, I think, the most distressing part of this problem.

Mr. MCDERMOTT. In your deliberations on how to finance it, did you think in terms of using some kind of retrospective reach back for a period of years and then cutting it off and then proceeding with 100 percent prospective?

Mr. SAMUELS. We did discuss that, and our first proposal, the administration's proposal was for a 5-year period with a $3.1 billion revenue target for 5 years. Energy and Commerce, when they reported the bill out, extended the program to 10 years, and the costs went up by $5 billion to $8.1 billion when that happened. We said that if you wanted it, you could use the same proposal that you have for the first 5 years for the second 5 years, but obviously there are variations on the theme, and I think we would be pleased to discuss those variations with the committee in the next few weeks.

Mr. MCDERMOTT. Give me your best arguments that went on at the table against the 100 percent prospective.

Mr. SAMUELS. The best argument is that it is likely that over time that tax will be passed through to the insureds; that is, the insurance companies will not bear the tax. Right now insurance companies are subject to State premium taxes, which average approximately 2 percent of the premiums. Those premium taxes are viewed by many as being passed through to the insureds; the insurance companies don't pay them. So the best argument against a prospective tax is if it is passed through, society as a whole will pay the tax and the insurance companies will not bear the burden of the tax, and they were the ones who are being relieved of this contingent liability and the morass of litigation. So you are reliev-

ing one industry group and you are shifting the burden to everyone else. That is the argument against a prospective tax.

Now, obviously, it is a complicated area and the insurance companies say that they are not sure they can pass it through. It is a cost of doing business but there is no assurances that they can pass it through and so therefore they will assume some of the burden of the tax or maybe all of the burden of the tax; it is going to be the market that will determine that. Those are arguments that I think one has to take into account.

Mr. MCDERMOTT. Why couldn't they pass it through if you raise everybody's tax by .002 or whatever, and that raises the cost of everybody's insurance, so it doesn't make any difference who I buy it from, which one of 10 insurance companies, I am still going to get that cost passed through, right?

Mr. SAMUELS. I think that is the argument. We have heard——

Mr. MCDERMOTT. That is the one you bought?

Mr. SAMUELS. Right. We have heard that there is obviously a self-insurance market out there, and if you raised the tax on premiums to too high of a level, people will shift from buying insurance from the property and casualty companies to self-insuring. We considered that, and I just will bring you back to the fact that State insurance premium taxes average approximately 2 percent.

Our proposed tax is a lot lower than that. The tax, for example, the State premium tax is 2.35 percent in California. It is 2 percent in Connecticut, it is 3.5 percent in Texas, it is 1.75 percent in Florida, so it varies. The average is about 2 percent, and that hasn't seemed to have caused an enormous problem in the industry in passing the taxes through.

Mr. MCDERMOTT. The States basically mirror image each other. Having been a State legislator, I remember we looked around before we raised any taxes to see what it was nearby.

Mr. SAMUELS. In Washington it is 2 percent, so you are right on target.

Mr. MCDERMOTT. If I understand the 70–30 split, that is your view of what those people who are presently in the market owed from the past or could be alleged to have owed from the past?

Mr. SAMUELS. We came out with that as a reasonable balance of the principles that we had articulated. As I said earlier to Mrs. Kennelly, we think this is one of the many possible solutions, and that the most important thing is to get this reform legislation through, and we aren't wedded to any particular percentage.

Mr. MCDERMOTT. They are not chiseled in granite yet? Thank you. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. All right. Let's see, Mr. Camp.

Mr. CAMP. Thank you, Mr. Chairman. I will also associate myself with the remarks of others who have expressed a great deal of concern about the retroactive aspect of the taxes. I don't like them, either. Can you tell me, the Congressional Budget Office scored the revenue and spending proposals of H.R. 3800, the Energy and Commerce-passed bill, did they not?

Mr. SAMUELS. We haven't seen the CBO estimate.

Mr. CAMP. You haven't seen the CBO estimate? Do you know whether it took place? It did? I see someone in the back nodding.

Ms. MUNNELL. Yes.

Mr. CAMP. It has happened?

Ms. MUNNELL. Yes, you are right, they are in the report from the Energy and Commerce Committee.

Mr. CAMP. And if I am not mistaken, the revenue estimate provided by CBO and the revenue projection developed by Treasury, on the corporate environmental tax differ, do they not?

Ms. MUNNELL. Differ?

Mr. CAMP. Yes.

Ms. MUNNELL. Yes. I am going to—I will let Assistant Secretary Samuels speak to this, but the Joint Tax Committee has come up with a new and lower number. As I understand it, Treasury is in the process of redoing its number, and to reflect the same kind of factors that call for the joint tax committee to lower its estimates.

Mr. CAMP. Do I understand that Treasury suggests a corporate environmental tax number of $2.3 billion over the years 1996 to 2000? Is that correct? Is that information accurate?

Mr. SAMUELS. I believe our number is $1.9 billion.

Mr. CAMP. $1.9 billion. Was there a time when you had put out a $2.3 billion?

Mr. SAMUELS. Yes, there was a time when we had a preliminary number.

Mr. CAMP. Then you have revised that back? What factors resulted in that revision?

Mr. SAMUELS. This was the result of mid-session review of the budget.

Mr. CAMP. Well, there must have been some specific factors.

Mr. SAMUELS. I don't know.

Mr. CAMP. If someone could get those to me, I would appreciate it.

[The information follows:]

Based on new corporate tax return data for 1992, the Treasury Department revised its revenue estimate for extension of the corporate environmental tax from $2.3 to $1.9 billion for fiscal years 1995–99. The newly available data show that alternative minimum taxable income (AMTI) was lower than previously estimated. Based on that information, projections of AMTI for the extension period were revised downward.

Mr. CAMP. The bill, as reported by the Energy and Commerce Committee, would require every dollar of taxes now dedicated to the Superfund trust fund, including this corporate environmental tax, to pay for Superfund. Is that accurate? All the money would be required.

Ms. MUNNELL. Yes.

Mr. CAMP. It is not a hard question. You have a puzzled look on your face, but I don't think it is a hard question. It would seem to me that the most direct way to deal with the extension of the Superfund taxes would be to include those as revenue sources for the Superfund reform bill or H.R. 3800. I am concerned that some of these revenues may be used to finance as part of other legislation. Could you comment on that for me?

Mr. SAMUELS. Let me just say that under the scoring conventions the extension of the excise taxes are assumed in the baseline, so they don't count for PAYGO purposes. The only tax that counts for PAYGO purposes is the corporate environmental tax, and as I understand the scorekeeping rules, the Superfund Program on the

spending side is a discretionary program, so its spending doesn't show up on the PAYGO scorecard, but the extension of the corporate environmental tax does show up on the PAYGO scorecard, so it creates a surplus. That was the bookkeeping adjustment that Secretary Munnell was discussing before.

Mr. CAMP. But in response to my earlier question, all of the taxes would be required to, "fully fund Superfund so that that is"——

Ms. MUNNELL. All of the taxes will go into the Superfund fund, trust fund, and all the money coming out of that fund will be spent only for Superfund expenditures.

Mr. CAMP. OK. Thank you. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Mr. Secretary, hearing you describe those bookkeeping arrangements reminds me of an old song, "Only Make Believe." Mr. Secretary, are there any other places in the tax law where the Congress has delegated to the Secretary of the Treasury the ability to change the tax rate?

Mr. SAMUELS. Mr. Chairman, the oil spill liability fund is financed by a nickel a barrel excise tax. That fund provides that the tax ceases, once the fund has $1 billion in it, and then if the fund balance then goes below that, it is triggered back on. That is one case where a tax will be triggered on or off depending on the balance in the fund. In this particular proposal we have the Secretary adjusting the rates to hit specific targets. It is not discretionary to pick a new target.

The target of revenue needed is in the legislation, and the rate will be adjusted if necessary to hit that target, so we don't view this as a discretionary process. It is really a mechanical process in that if we don't hit the target of adjusting the rates to hit the target, in the same way that the oil spill tax will come back on to fill the oil spill fund back up to $1 billion.

Acting Chairman GIBBONS. Now, all of us have to realize in writing tax law that one of our responsibilities is to make sure that once we levy a tax that it can be appropriately collected. Are you confident, Mr. Secretary, that the companies have the necessary records to compute the retrospective tax? How will the IRS audit them?

Mr. SAMUELS. Mr. Chairman, the companies will look at their NAIC forms, that is the National Association of Insurance Commissioners, that they file each year. Here is a copy of the form that has columns for lines of businesses. Line number 5 is commercial, multiple peril insurance, which is one of our bases, and line 17 is other liability. The companies would go back into their files, pull out these statements that are filed every year, and look at the columns and add up the numbers. We think for the companies that have been filing these statements there shouldn't be any difficulty in arriving at the premium base on which the retrospective fee is calculated.

Acting Chairman GIBBONS. Now, these companies have been bought, sold, traded, and in some cases gone out of existence. How are we going to levy a tax in that kind of environment retrospectively?

Mr. SAMUELS. Well, I think that, one, for the companies that are no longer in business, obviously, they are not in the tax base. And with respect to transactions among companies, those transactions

are well-publicized and people keep track of them, and we think that it will be possible for companies to establish what their retrospective premium base will be.

Acting Chairman GIBBONS. How do you anticipate dealing with the 85 percent tax trigger? If the tax is not triggered, will the amounts collected up to that point be refunded?

Mr. SAMUELS. That is a difficult issue. We certainly understand the issue and the concerns of the insurance industry. They don't want to be in a position where in effect they are hit twice, once under the fee proposal and then also because companies aren't participating in the fund. We are concerned about whether the approach that has come out of Energy and Commerce is the best one.

I think it is unprecedented to have a tax click off or on depending on participation in a fund, and I think that this comes down to basically a question of congressional authority and how you want to structure it, and we would very much like to work with the committee in looking at——

Acting Chairman GIBBONS. Well, do you have any ideas how we ought to structure it?

Mr. SAMUELS. Well, one possibility would be for the fund to receive in effect its startup financing which it needs to administer the offers—to finance that outside of the fees, and that is one possibility. It raises the questions of where that money would come from, whether it could come from the Superfund, and that raises, of course, authorizations and appropriations issues.

We are aware of the problem, and as I said, we don't have a solution today to offer, but we would be pleased to work with you in the coming days to see whether there are any options that are better than the one that is now on the table.

Acting Chairman GIBBONS. Well, we expect you to do the leading in this dance that we are carrying on here, and so come up with some proposal real quickly for us. Some U.S. risks are now insured or were insured between 1971 and 1985 by foreign insurers that do not have a physical presence in the United States today. Perhaps some of the foreign insurers that covered U.S. risks during the 1971–85 period no longer cover policies that cover U.S. risks. How does the administration proposal insure that foreign insurers pay their share of these retroactive taxes?

Mr. SAMUELS. Mr. Chairman, if a foreign insurer has no participation in the U.S. market, but they had been involved in the past, there is no way for us to collect fees from them. They are gone from the market. We believe, however, that most foreign insurers, given the size of the U.S. market, have continued to participate in the market.

For those insurers, those foreign insurers who are continuing to participate in the market, we say to them you have to pay a fee of one-half of 1 percent on the maximum coverage of policies you write for U.S. risks. This one-half of 1 percent fee is not on the premiums, it is on the maximum policy coverage. We also say to the foreign insurers, if you don't want to pay this one-half of 1 percent fee, you can come in and elect to be taxed on the retrospective basis.

You will have to show us your books and records and establish to the satisfaction of the Internal Revenue Service what your base

is. We would expect that the foreign insurers would make this election rather than pay this one-half of 1 percent fee on the policy coverage limits on a going-forward basis, so we think that that will bring the foreign insurers who wrote policies in the past and have liabilities in the past and who continue to operate in the U.S. market to participate in a fair way in this process.

Acting Chairman GIBBONS. It is my understanding that under the program reforms included in H.R. 3800 as reported by the Energy and Commerce Committee, a PRP can purchase an annuity to satisfy its Superfund obligations, and turn that annuity ownership over to the Federal Government with payments running from the annuity to the Federal Government to coincide with the PRP's Superfund obligations. Is that a correct statement?

Mr. SAMUELS. Mr. Chairman, that is correct, and we have significant concerns about that proposal. One concern is that there is already a provision, a section in the Internal Revenue Code, section 468B, which deals with structured settlement funds involving environmental liabilities, and we would have thought that it would be appropriate to try to use what we already have in the Internal Revenue Code.

If we want to expand it, we should look at it that way, but to have another method of settling claims outside of the Internal Revenue Code is something that I think should be given very serious attention. Another aspect of the proposal is that it appears from the proposal that if a company bought an annuity and transferred it to the EPA that the income, the interest on the annuity, wouldn't be taxed because it would be held by the EPA.

If the company just bought an annuity and held it, obviously it is going to pay tax on the income from the annuity so that the proposal, as we understand it, will exempt the investment earnings on the annuity from Federal tax. We think that that is a serious issue that needs to be carefully addressed.

Finally, the proposal puts the credit risk of the insurance company writing the annuity onto the Federal Government, and that is another aspect of the proposal that we think needs to be seriously considered to make sure that everybody understands, because these annuities, right now the program, I understand there is a program that is quite small. This program could be much larger and you could have very large annuities, and the Federal Government could at the end of the day suffer if the insurance company that wrote the annuity had financial difficulties, so we think that this proposal raises a number of issues and that they need to be very carefully considered before going forward.

Acting Chairman GIBBONS. Well, in the annuity program which was adopted by the Energy and Commerce Committee, would a taxpayer under present law receive a current deduction for the purchase price of the annuity at the time it was purchased?

Mr. SAMUELS. We believe that the taxpayer would receive a deduction under the program, as we understand it, that came out of the Energy and Commerce Committee. They would receive a deduction now and they wouldn't have income later with respect to the investment earnings on the annuity because that income would be the income of the Environmental Protection Administration because they are buying an annuity and transferring it to the EPA.

Under section 468B the investment earnings are taxed to the structured fund. The trust holds the assets so that that is the way that particular section has been designed by this committee.

Acting Chairman GIBBONS. Madam Secretary, you piqued my interest when you mentioned that when people go back to the fund that you set up here, California may get 60 percent, while Florida may get another amount. Tell me about that a little more. I don't understand all of that.

Ms. MUNNELL. Under current arrangements, the amount of money that the PRPs end up receiving from their insurance companies usually depends on decisions made by State courts. Those decisions vary a lot. For example, in the State courts it seems like that the PRPs win a lot in California, and the insurers win a lot in Florida.

As a result, as part of the agreement, the insurers and the PRPs listed States, where PRPs would receive 60 percent on the dollar and States, where they would receive 20 cents on the dollar. California is in the 60-cents-a-dollar group. Florida is in the bottom. There are seven other States in each group, and then the rest of the States fall into the middle, the 40 percent payoff. So basically if you win a lot, you get a high payoff from the EIRF. If you lose, if the PRPs tend to lose a lot they get a low payoff from the EIRF. The notion is that they will reflect the pattern of the State court decisions.

Acting Chairman GIBBONS. I guess that is what you call rough justice.

Ms. MUNNELL. It is rough justice. It is not where the companies are located. It is where the sites are located or where the PRPs have established litigation venue.

Acting Chairman GIBBONS. That is about the roughest justice that I could imagine under a tax law.

Mr. Pickle.

Mr. PICKLE. Well, I thank you, Mr. Chairman. I don't want to belabor this hearing, but I want to say at the outset, again, that I think your proposal has a lot of merit and it is an earnest effort to try to approach this problem from a different angle and to get action and get results.

Now, I think we ought to look at it as a committee positively, and I believe we will. There have been some recommendations made, I think, by the administration urging for us to hold this hearing and have a markup and pass this bill by the August recess.

Now, Mr. Secretary, and Assistant Secretary, that ain't going to happen. We must, as a committee, now determine how these taxes will be levied and how we go about it. When Mr. Samuels was asked by Mrs. Kennelly a few minutes ago has this reach-back procedure been used before and he said he did not remember any instances. I will remind you of one here this last session.

We passed the reach-back provision for the coal miners that had been advanced by Senator Rockefeller, and we went back and we put tax on companies that had been out of the coal business for 20 to 40 years, and yet we went back and said that you are going to have to pay a certain amount, even though you legally got out of the fund years ago and paid the penalty, we are going to put a tax

on you no matter what, just because we are going to pay for coal miners' benefits.

That is very controversial, still is and still was a bad procedure in my judgment, and I protested it strongly. Some of the other members of this committee did too. You put this kind of reach-back in on the insurance companies altogether and it is going to be a controversial question.

Now, that doesn't mean that it won't or shouldn't be, but you have to ask yourself at this time is this the procedure we are going to use for funding programs when we have a critical problem in years to come? You have already used it in the reach-back for coal miners. Are you going to use this again?

Now, that one was to help finance coal miners' benefits and maybe prevent a strike. In this particular instance you are going to use it to help companies get together and determine their obligation, their liability, and I have to say to you that I don't know how much different it is, but it does raise a question about how do we proceed, so I will just say to you, Mr. Secretary, you have said two or three times this morning that what we have proposed is just a recommendation which could be one of several approaches, and I can understand why you would say that because you have to be as specific as you can with the leeway of this committee. But I don't think you should expect this committee now to come up with the settlement on these tax procedures with respect to the percentage to be paid by these reach-back companies.

I want to make sure that we ought to proceed. It is a good proposal, but we have to work it out and I think we have got to have your specific recommendation now. I am pleased that the companies have come together and they have said we would like to set up this fund, and we recommend it.

I know that Senator Baucus put in the record for his hearing on the Public Works Committee a list of the people who had said they would advocate the approach to establish the insurance fund, and he listed some, oh, maybe 50 companies here or more that would support that approach. I want that same list to be put in our record and similarly the environmental organizations submitted a list to him of those companies who recommend this approach, and I want to put that in the record, and I would ask both of you, if you have other companies who have said, yes, they would lend their support.

I notice in the companies advocating the prompt reform of the Superfund that they recommend this general approach, but only one or two of them were insurance operators and I want to get a little bit more specific who recommends this particular approach. I also say to you when you say that you go to establish this fund, but it won't go into operation unless 85 percent of the companies agree, and you tell me that the companies have agreed to this, does that mean that you have polled companies and you think 85 percent of them will approve it or is this just something you have kind of reached out of the hat and figured that would be a good round figure? Obviously, you think that 85 percent will approve it. Now, how did you base that and why did you use the 85 percent figure?

Ms. MUNNELL. Mr. Pickle, the 85 percent figure came out of negotiations between the PRPs and the insurance companies. We are

very sympathetic with the intent of the insurance companies, and that is that they are reluctant to have these taxes established if no one is going to come to their fund for settlement, and so that seems like a legitimate concern they have. The question is how do you work it out.

Basically, they are proposing a referendum that they would send out to the PRPs, and the PRPs would respond whether or not they would participate, and the notion was that weighted by sites that 85 percent would have to say that they were going to participate before the taxes went into effect.

Mr. PICKLE. Will this be 85 percent of the companies involved?

Ms. MUNNELL. Right.

Mr. PICKLE. Well, now, I understood when you go to put the original tax on it, that would go against all companies, all corporations, all the insurance companies. Is that correct?

Ms. MUNNELL. The question that the 85 percent is addressed to is whether the companies, the polluting companies are going to participate in this game or not, and it definitely is a troublesome issue to get over, but it is also very understandable how the insurance companies would want some insurance that this was going to work before the tax went into place.

Mr. PICKLE. Let me try to reduce it down to a simple question. To establish the fund, the EIRF, whatever it is, how do you say that?

Ms. MUNNELL. EIRF.

Mr. PICKLE. To establish this fund and get some money to operate, we will go to all insurance companies, all property companies; is that correct?

Ms. MUNNELL. All property and casualty companies engaged in certain lines of business that would lead to——

Mr. PICKLE. Only those that could lead to possible suits involving the Superfund?

Ms. MUNNELL. Right.

Mr. PICKLE. That is a little better.

Ms. MUNNELL. Thank you.

Mr. PICKLE. But to determine that, we have got to figure out how to raise that money and how to go about it, and I think it will take a little time to determine that. I think we ought to go to work on it, but I don't think we ought to think that we are going to run a race with time here, try to pass something out of here that far-reaching. I am encouraged that you think the time will speed up.

Ms. MUNNELL. Yes.

Mr. PICKLE. Maybe 25 percent better?

Ms. MUNNELL. We are certainly anticipating 20 to 25 reduction on cleanup costs.

Mr. PICKLE. You said the costs.

Ms. MUNNELL. Right.

Mr. PICKLE. Now, would that be applicable on a time basis too?

Ms. MUNNELL. Getting this allocation process into place should certainly speed up the allocation process and get cleanup started faster.

Mr. PICKLE. Who would make the determination, then, that a site is cleaned up?

Ms. MUNNELL. EPA.

Mr. PICKLE. All right, EPA. The key to this whole operation in my judgment, is whether you get off to a good clear understanding when you appoint the allocator, because whatever happens from then on you are going to go back to that basic agreement. Does the mediator or the allocator need more powers, more authority? Do we need to close in with more power to move forward or not?

Mr. ROBERTSON. I don't think so, Mr. Pickle. We believe that the authority invested in the allocator, as in the bill that was reported out of the Energy and Commerce Committee, is appropriate.

Mr. PICKLE. All right, I hear you. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Mr. Houghton.

Mr. HOUGHTON. Pass.

Acting Chairman GIBBONS. OK. Mrs. Kennelly.

Mrs. KENNELLY. I would just like to make a couple of comments before you leave. Thank you very much. I know how much time you have put into it, but having said that, I began by saying that so many people commend the fact that Treasury and the insurance industry and environmentalists all got together and worked so hard on a solution, and yet I know that many of those people involved in getting that solution don't agree with all the results and I know the administration has cited this as a wonderful example of working together, but if you work together and then you find you are no better off, I don't think it is a good example.

Mr. Samuels, I would just like to comment. You said to Dr. McDermott your main thought on why you couldn't go 100 percent prospective was that the tax would be passed on to the consumer. I would like to just say that since the Superfund legislation was written years after most of these policies were written, there is not really any relationship between liability today and underwriting, A. B, all of us who are on this committee, Ways and Means, and not everybody wants to get on this committee because they say, boy, I don't want to tax my constituents and that is what you people do. We are talking about a tax here today, and I have to tell you something that I have had to learn, but almost every tax is passed on to the consumers, so whether it be prospective or retroactive, I am afraid that whatever we do will be passed on to the consumer. And what I think you have to understand is some people went into this in good faith hoping some of the burden of liability would be lifted, and that is why they agreed to a new tax.

Nowadays, very few people agree to a new tax, so I think that the answer to Dr. McDermott, yes, it will go to the consumer, and so will most other taxes. Thank you very much.

Acting Chairman GIBBONS. Mr. Hancock.

Mr. HANCOCK. Pass.

Acting Chairman GIBBONS. Mr. McDermott.

Mr. MCDERMOTT. I would yield to Mr. Payne.

Mr. PAYNE. Thank you very much, Mr. Chairman. I have one fairly quick item, but it has to do with your statement, Madam Secretary, concerning the fact that the cost would be lower in the future. I think in response to Mr. Houghton's question earlier you indicated that it would result from proposed changes in cleanup standards, et cetera.

Your statement talks about the fact that the new standards have taken into account land use. I think that is an excellent idea and

something certainly that should be taken into account. My question is to some extent a parochial question, but it is an important one having to do with land use and having to do with remote areas and hot spots. Can somebody from EPA comment on the changes that we might expect to see in the legislation regarding hot spots in remote rural areas?

Ms. MUNNELL. They are conferring.

Mr. ROBERTSON. Mr. Payne, I am going to ask Jerry Clifford, Director of our Superfund Reauthorization Task Force, to respond specifically about hot spots in remote areas.

Mr. CLIFFORD. Mr. Payne, the provisions in the bill relating to hot spots are twofold. We have taken in this bill, taken the broader preference for treatment that applies to all sites—across all sites in the current bill and limited it just to hot spots. And we have eliminated the preference for permanent remedies across all sites as well.

So what this bill does is acknowledge where we have highly contaminated materials—that those highly contaminated materials should be treated to the extent we can and eliminated from the environment.

Mr. PAYNE. So you are saying that, irrespective of whether these are in rural remote areas or wherever they are, that you would give a preference to treatment in those instances?

Mr. CLIFFORD. That is correct—with two exceptions for hot spot materials.

One is when you have—and the best way to describe it would be by example. Where you had, for instance, a landfill and you know that we are not going to treat the entire landfill, even though there is hot spot material in that landfill. Where you had relatively small quantities of hot spot material in that landfill, there is an exception in that case which would basically say in those situations it probably does not make sense to spend the time and effort to, one, locate that hot spot within a landfill; and, two, even if you could find it, to treat it. Because that landfill is going to be in place and protected, and human health would be protected from that entire landfill anyway. So, in that instance, we would not require treatment of that hot spot.

And in the other exception where you have extremely large areas of material that would otherwise qualify as a hot spot, an example might be a mining site where you have acres and acres and maybe square miles of contaminated material which would qualify as a hot spot. But given the magnitude and volume of that material, we, the government or the responsible party, would not have to treat that material.

So those would be the two exceptions to the hot spot preference for treatment.

Mr. PAYNE. Thank you, Mr. Clifford, and I see my time has expired. Thank you very much for that explanation.

Acting Chairman GIBBONS. Let me ask you another tax question, Mr. Samuels.

Some taxpayers have suggested that the Superfund petroleum tax should not apply to certain petroleum products that are exported. What is your view on a proposal to provide a refund or

credit for Superfund taxes paid with respect to crude oil or petroleum products used to manufacture or produce motor fuel?

Mr. SAMUELS. Mr. Chairman, since the production of petroleum products creates environmental risks, I think that it is difficult to justify an exemption for exports on an environmental ground.

The Superfund excise tax on petroleum is approximately 0.5 percent of the price of gasoline or about $0.0023 per gallon. And we think that a tax that is this small is unlikely to create a competitive disadvantage, which is why someone would want to exempt the exports.

I would note that there is a special rule for chemicals that are exported where the tax is generally significantly higher. It is 1 to 2 percent of the wholesale price.

So, I think, to the extent that people are concerned about the competitive situation, they have a stronger case with respect to chemicals.

So that is our analysis. We note that if a refund for exports had been available for petroleum products in 1993, our current and preliminary estimate is that would have cost approximately $15 million.

Acting Chairman GIBBONS. Do other Members have questions that they would like to ask of this panel before we go on to the next panel?

Thank you, Mr. Samuels and Ms. Munnell. Let me say before you go, I think you recognize that this committee is not too enthusiastic about proceeding very rapidly you better push us, and you better come up with suggested provisions. Don't depend on us to volunteer to do any lifting on this thing. We are expecting to hear from you.

Thank you very much.

Ms. MUNNELL. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Let's now go to a panel composed of the American International Group, the Alliance for a Superfund Action Partnership, the Coalition for a Sound Insurance Resolution Fund and the American Insurance Association.

Let me assure all of you your full statements will be in the record. Please try to summarize the high spots for us.

Mr. Greenberg.

STATEMENT OF MAURICE R. GREENBERG, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AMERICAN INTERNATIONAL GROUP, INC.

Mr. GREENBERG. Thank you, Mr. Chairman.

Today, I am going to comment principally on the tax-funding aspects of EIRF. The views I am going to express today are supported by two major insurance associations that will also be appearing before you today: the National Association of Mutual Insurance Companies, representing 1,240 insurers, and the National Alliance of Independent Insurers, representing 575 insurers.

In the aggregate, approximately 75 percent of the insurance industry, measured on the premium basis, opposes the prospective tax as a means of funding EIRF. The fundamental issue is quite simple. Insurance companies that underwrote certain classes of insurance collected premiums and benefited at the time financially.

Now, as claims have arisen on those policies that were underwritten prior to 1986, these companies wish to shift the funding of those liabilities under EIRF to others in the insurance industry who did not underwrite those risks or receive the benefits.

How can you justify shifting financial responsibility to others because certain insurers did not foresee the outcome of their actions?

We have a number of classes of business that we underwrote previously that did not turn out so well. If you have the time I would like to come back this afternoon and see if I can get something shifted to somebody else.

On a more serious note, insurance companies that were founded after 1986 who never were involved at all in Superfund sites under a prospective tax would be burdened by funding the losses of others.

Traditional trust fund concepts have dealt with massive liabilities in the past, whether it be asbestos or, more recently, breast implants. They never looked to insurers who did not have liability to pay loss. They looked to those who wrote the risk and had collected the premiums.

A further issue regarding the funding of EIRF has to do with foreign insurers, including Lloyd's of London. Lloyd's was one of the largest underwriters of excess liability insurance, a class of insurance involved in Superfund liability pre-1986.

During that period, premium rates were very low in relationship to the liabilities being provided. The result is that Lloyd's accumulated massive amounts of liability for very low rates. Under EIRF, they would be relieved of much of this massive liability for a very small tax, shifting the burden to U.S. insurers who were principally underwriters of primary coverages, that is lower limits of liability where higher rates were charged.

The way it works under EIRF, domestic insurers would bear the burden and relieve Lloyd's. In other words, U.S. shareholders of insurance companies would pick up the tab.

There are those who have argued that it is difficult to implement a retrospective tax because the information is difficult to determine. Let's be clear on this point. The information is readily available, and I believe the officials at Treasury concur with the statement. Mr. Samuels in his comment earlier said that solvency was an issue and, hence, some consideration was given in that regard.

Let's also be clear that there are insolvency funds and a procedure in the United States that if any company does become insolvent the whole insurance industry participates, not just a selected few.

Thank you very much.

Acting Chairman GIBBONS. Thank you.

[The prepared statement follows:]

U.S. House of Representatives
Committee On Ways and Means
Testimony of
Maurice R. Greenberg
Chairman and CEO
American International Group, Inc.
on
The Superfund Reform Act of 1994, H.R. 3800
July 25, 1994

I am Maurice R. Greenberg, Chairman and CEO of American International Group, Inc., (AIG), a major underwriter of commercial property and casualty insurance in the United States. I appreciate the opportunity to present our views on the taxing provisions (Title IX) of the Superfund Reform Act of 1994, H.R. 3800. My views are supported by two major insurance associations appearing before you today, the National Association of Mutual Insurance Companies (NAMIC) --representing 1240 insurers -- and the National Alliance of Independent Insurers (NAII) -- representing 575 insurers.

My comments to you this morning can be summarized in the following six points:

(1) There is a bitter division within the insurance industry over the proposed taxing mechanism in H.R. 3800.
(2) Most of the insurance industry opposes the Environmental Insurance Resolution Fund (EIRF) as contained in Title VIII of H.R. 3800 for which the tax would be raised.
(3) If there is an EIRF, the majority of the insurance industry opposes anything less than a 100% retrospective tax to fund the EIRF.
(4) Anything less than a 100% retrospective tax would be grossly unfair to most domestic insurers currently writing commercial business.
(5) Regardless of how the tax is collected, the EIRF proposal is a windfall for foreign insurers and reinsurers.
(6) We would much prefer the comprehensive reform of the Superfund proposal as embodied in the impending legislation based on the Eight Point Plan of the Alliance for a Superfund Action Partnership (ASAP).

With respect to our opposition to the bill's taxing provision, AIG is supported by hundreds of insurance companies, representing 75% of the property/casualty insurance industry as measured by premium volume.

As you know, the Administration proposes that 70% of the $3.2 billion to be raised for the EIRF over the first five years come from a retrospective tax. This would be derived from an assessment on the net premiums collected by insurers on corporate general liability policies or commercial multiperil policies issues between 1971 and 1985, and on a certain percentage of reinsurance. The remaining 30% of the assessment would be raised through a prospective tax on premiums collected on commercial general liability lines during the life of the EIRF. In the first ten years, a minimum of $8.1 billion would be raised from the insurance industry only to pay for the EIRF, with an additional $1.2 billion to be raised each year after that in perpetuity.

You will hear from a witness today representing the American Insurance Association (AIA) -- which represents approximately 25% of the commercial liability premiums written and affected by the taxing provisions of this proposal. They are now supporting the Superfund Reform Act of 1994 on the condition that funding for the EIRF be raised by an assessment on the insurance industry that is 100% prospective in nature. You will also hear today from a witness representing several key AIA members who originally supported the Administration's proposal who now completely oppose a 100% prospective tax.

We oppose, in the strongest terms, the prospective portion of any proposed tax, whether it be 30% prospective or 100%. Taxing insurers on a prospective basis to fund the EIRF is an outrageous attempt to extort payments from those who have little or no liability in order to provide a windfall for those insurers who are contractually bound and facing enormous liabilities. How can you justify shifting costs from those who *are* legally bound to pay to those who bear no responsibility? It is only fair that the assessment be levied on those same insurers who have financially benefited from the insurance contracts written and premiums collected in prior years (1971-85), on the classes of insurance policies where the legal disputes are being settled and paid out of the EIRF for those same years.

Under a retrospective tax, the class of insurers benefiting financially from premiums collected and from complete release of liability for years prior to 1986 anticipated under the EIRF would be, as closely as possible, those same companies who are being assessed with the tax for the same retrospective policy years under legal dispute.

The insurance industry has had a long experience dealing with settlement trust funds of the type proposed in the EIRF. Traditionally, in such well publicized liability areas as asbestos, insurers contributed a negotiated amount of funds in exchange for 100% release of further liability and legal claims for the contract years in dispute. This is a well-established legal principle in contract law.

The Treasury Department followed traditional settlement trust fund principles when it originally designed the EIRF. The logic and legal principles were simple, and they have been consistently applied when implementing trust funds: those who benefit are those who pay. The 70% retrospective portion of the tax follows the traditional legal settlement trust fund approach which was the reason some in the insurance industry attempted to negotiate with the Treasury in the first place when considering Superfund legislation.

Why should this trust fund be any different?

In fact, the tax should be 100% retrospective. If the tax assessment becomes prospective, the insurers benefiting from release of 100% of liability for these enormous claims between 1971-85 (and earlier) are not the same parties who would bear the burden of the tax. Setting up the trust fund in this way would be in direct contravention to established industry practice as to how such trust funds operate.

Then there is the issue about how to handle policies written after 1985. Since 1986, all insurers have included very specific pollution exclusions in all policy coverages with respect to environmental risks. Therefore, there is no liability for Superfund claims on policies written since 1986. A purely prospective tax would have absolutely no connection to any relief from claims -- the very purpose for which the tax is being collected. You might as well impose a prospective tax on bread makers or candy store operators for all its relevancy to insurers being relieved of liability under the EIRF.

Moreover, imagine you started an insurance company today that had not yet written a single contract. Any contract written in the future would have an explicit pollution exclusion like any other insurer. Any prospective tax to pay for the EIRF would saddle them with a tax to release other companies from their past liabilities. How fair is that?

The EIRF would allow insurers who wrote the lion's share of policies being released from all liability incurred at any time before 1986 -- many of whom have vastly reduced market shares today -- to be relieved of their legal

responsibility to pay indemnity and defense costs at National Priority List (NPL) sites. In exchange for this relief, however, a prospective tax would allow some insurers to make out like bandits.

Our opponents have tried to argue that a retrospective tax would be too complex to administer. The Treasury Department disputes this and has already devised a way of administering the tax. Very precise figures are available from state filings going back at least as far as 1940. Treasury has proposed adding together all the premiums written on both commercial multiperil and other liability policies by insurers from 1971 through 1985. That number would be adjusted for inflation in 1985 dollars. Then, that number would be multiplied by a percentage to get the amount to pay. That sounds pretty straightforward to me.

Finally, some argue that you cannot favor elimination of retroactive liability -- as AIG strongly does -- and advocate a retroactive tax at the same time. But if you retain retroactive liability (as in H.R. 3800) and create a dedicated fund, as in the EIRF, to provide relief for a certain class of insurers who wrote certain kinds of liability policies, it is totally inconsistent to relieve liability and then apply a prospective tax. Again, those who receive the relief should bear the burden of the tax.

The Administration's tax proposal will also result in a massive subsidy for some foreign insurers at the expense of domestic insurers. Foreign insurers and reinsurers, particularly the London insurance marketplace will win big under the Administration's proposal. Proportionally, foreign companies will benefit the most from releases of liability under the EIRF and will pay the least under the Administration's taxing proposal.

Until 1986, the London market wrote the largest concentration of commercial general liability and multiperil policies, collected the least amount of premium relative to the risk actually accepted, and correspondingly incurred the largest amount of real liability. For example, actual direct excess liability market rates were less than $1000 per million dollars of coverage (or 1/10 of 1%) in the early 1980s. At the same time, the London market probably had even lower rates due to higher attachment levels.

Despite the relatively limited premium collected, certain London market pools have very large concentrations of losses and potential liabilities that would be relieved by the EIRF. The London market was the largest provider of excess liability coverage and high layer reinsurance which, by their terms, create liability for the insurer or reinsurer only if the loss exceeds a very high amount or level of risk as provided by the contract. Since the risk of loss appeared remote at the time the contracts were written, the premiums collected were relatively small.

In this regard, the tax proposed on foreign insurers and reinsurers would be minuscule. For the first year, it would amount to only .2 of 1% of the 1/10th of 1% of the risk upon which losses have occurred. Let me also emphasize that foreign reinsurers are taxed on a net rather than gross basis, making their tax liability even smaller.

How can the EIRF be viewed as anything short of a bailout of the London insurance market at the expense of the U.S. domestic insurance industry?

As long as the tax is levied as a fixed percentage on all insurers, those with the least amount of premium and the highest concentration of loss benefit the most. More importantly, if the tax becomes as much as 100% prospective, it is unlikely that any significant amount will be collected from foreign insurers -- the very firms who stand to benefit the most, since many have significantly cut back or left the market entirely in the last several years.

In addition, high layer excess liability and reinsurance contracts written in the past with foreign insurers and reinsurers typically retained potentially very large amounts of liability. As such, their risk exposures were generally spread by the market among a multitude of foreign insurers each accepting a small portion of the risk and premium. The Administration's bill is especially favorable to these foreign insurers in general, and particularly the London market excess liability business, since it provides:

(1) an exclusion from the tax if, from five years after the date of enactment of this legislation, the foreign insurer or reinsurer (and any of its related group) does not issue a casualty insurance policy with respect to United States risks, and

(2) an exclusion from the retrospective tax entirely if the aggregate premium of the foreign insurer was less than $50 million in the relevant years.

Many non-admitted foreign insurers and reinsurers received a relatively small amount of premium relating to the high layers of attachment they assumed. Therefore, many will qualify for the $50 million exclusion in the Administration proposal even though they have large levels of net retention of losses that have occurred because of the size of Superfund site claims. London market practices of spreading risk dictated that so many of these risks be spread among a multitude of non-U.S. licensed foreign insurers, making it highly unlikely that many of them have an aggregate premium above the $50 million threshold.

Similarly, many of these same foreign non-U.S. licensed insurers or reinsurers are writing fewer U.S. risks today due to changes in market conditions. Recent market surveys show that very significant amounts of the high layer excess liability and pollution liability classes of business have shifted away from the London market in the past few years.

The EIRF under any variety of funding schemes may disproportionately benefit one U.S. licensed foreign insurer in particular -- Lloyd's of London -- the principle reinsurer of the U.S. market. Lloyds has recorded unprecedented losses in recent years, including in areas of pollution liability coverage. For example, a May 23, 1994 article in Business Insurance states:

> " Most of the pure year [Lloyds] losses from 1988 to 1991 stem from the now defunct syndicates specializing in London market excess loss of reinsurance. There has been continuing deterioration in old year liabilities. Total additions to reserves for old year losses, which primarily are U.S. liabilities, were approximately 4 billion pounds ($5.92 billion) between 1989 and 1991. Reserve additions for old year syndicate accounts in run-off grew by 68% to 1.14 billion pounds ($1.69 billion) in 1991 from 677.8 million pounds ($1.03 billion) in 1990, fueled by additional provision for long-tail U.S. liabilities like pollution and asbestos claims."

Although Lloyds has denied it, according to a May 2, 1994 article in Business Insurance:

> "A report issued late last month by insurance archaeologists, R.M. Fields & Company, contends that Lloyds requires 15 billion pounds ($22.5 billion) in reserves to pay for its portion of billions of dollars in global asbestos and pollution claims but only has reported 4 billion pounds ($6 billion) to pay for those losses."
>
> "Syndicate analyst, Chatset Limited, also has said syndicates are under-reserved, estimating last year that about 8.6 billion

> pounds ($12.9 billion) more in reserves will be needed to run off open years." (Business Insurance, December 20, 1993).

However many billions of dollars of Lloyds' potential liability may be forgiven by the EIRF, it appears that Lloyds would be paying a very insignificant amount in tax. That leads to two questions -- First, how can Congress justify giving Lloyds such a huge windfall? Second, do we want to transfer existing liabilities of foreign entities to American companies who may not have even been in existence before 1986?

Let me reiterate the point I made at the beginning of my testimony. We strongly oppose the purpose for which the EIRF tax is to be raised, as well the proposed methods of raising the funds to fund it. We believe that far more revenue than is estimated will be required to fund the EIRF, and have grave concerns about how the money will be raised. The vast majority of the insurance industry opposes the EIRF. The vast majority also opposes a prospective tax -- as do many PRPs -- because such a tax is so unjust and so divorced from established principles of insurance settlement funds. Under any notion of fairness, equity or legal principles, those insurers who benefit from release of potential liability in their legal disputes should be as closely as possible the same parties who bear the burden of funding the EIRF.

Acting Chairman GIBBONS. Mr. Wallace.

STATEMENT OF W. LARRY WALLACE, EXECUTIVE DIRECTOR, ALLIANCE FOR A SUPERFUND ACTION PARTNERSHIP

Mr. WALLACE. Good morning. Thank you, Mr. Chairman for including the complete statement in the record. I am making a summary of my statement.

I am Larry Wallace, executive director of the Alliance for Superfund Action Partnership. I appreciate being here today to share with you ASAP's views of H.R. 3800.

I never dreamed of having the opportunity to present my views before such an important committee as I grew up in a shotgun house on the wrong side of the tracks in Raleigh, N.C. That house was painted, inside and out, with lead paint. It was near a plant spewing air pollution, near an oil storage facility, next to a recycling dump and a swamp that flooded those toxics under our homes.

Between that time and this date I have gone on to obtain an engineering degree and a law degree at Harvard Law School and practiced 20 years of environmental law. I currently serve on five boards of directors for environmental groups across the country.

Some have argued that a civil rights group like the National Association for the Advancement of Colored People shouldn't be involved in a debate over toxic cleanup. I do note to the committee that 3 out of 5 waste sites in this country are in minority communities and writings in the National Law Journal last year suggests that cleanup takes place at a slower rate in minority communities.

The fact is that many inner city and minority communities cannot even make the Federal cleanup list and then those that do tend not to be cleaned up by the resulting legal warfare and delay that exists in the failed Superfund program.

Today, ASAP represents the broadest and largest diverse constituency of Superfund stakeholders that you can find. In addition to the NAACP, local governments, the Furniture Manufacturers Association, the city of Atlanta, the Society of Independent Gas Marketers, the National Food Processors Association, the Grocery Manufacturers Association, AIG, Texaco, Phillips and from many others. A full list of our membership is attached as an addendum.

Mr. WALLACE. At one time or another, everyone has said that there is too much litigation in Superfund, too much mistrust and too little cleanup. Your committee is being asked to continue more than $1 billion a year in current taxes and to raise hundreds of millions more.

You are the check writers for this program. You should, therefore, have confidence that the money is spent wisely. Yet you are here today considering seriously a bill drafted by the administration which keeps the failed system in place. Moreover, the bill contains provisions that would divert dollars from the legal warfare—divert dollars from cleanup into the legal warfare.

I brought with me today a chart that summarizes the effects of where the changes the administration is proposing would put us in terms of spending under the Superfund program. The program right now is authorized for about $1.5 billion a year. The EIRF tax is the first bar which goes above the line an additional $700 mil-

lion. The second line is an additional $300 million that would be earmarked for the orphan share fund under the bill.

We also have estimated that there are about $50 million in increased transaction costs for the administration as a result of having to go through the new proposed allocation system. In addition, there are $160 million of new programs that they are proposing under the bill that are unfunded.

If you take the second and third bar, the orphan share and the increased transaction cost for the Government, that means you would spend $350 million less for cleanup than has been spent in years past. If you also actually implement proposals that they talk about in the administration bill, you would then have, under our estimates, $510 million less for cleanup.

In summary, Mr. Chairman, we ask that the committee cautiously consider the proposals in the administration's bill. We think H.R. 3800 is a bad proposal, and we think that if new taxes are to be raised and if the program is to be reauthorized, that it should be reauthorized in a manner that is fair, proper, right and that will promote cleanup and not reduce the amount of money for cleanup.

Thank you.

[The prepared statement and attachment follow:]

Testimony of W. Larry Wallace, Executive Director of the Alliance for a Superfund Action Partnership (ASAP)

July 25, 1994

Good Morning. I am Larry Wallace, Executive Director of the Alliance for a Superfund Action Partnership (ASAP). I appreciate you inviting me here today to share with you ASAP's views of H.R. 3800.

Today, ASAP represents the broadest and largest diverse constituency of Superfund stakeholders you can find: the NAACP, Local Governments for Superfund Reform, the American Furniture Manufacturers Association, the City of Atlanta, the Society of Independent Gas Marketers of America, the National Food Processors Association, The Grocery Manufacturers of America, Johnson Controls, Inc., the American International Group, Texaco, Phillips, and many others in a variety of fields. A full list of current membership is attached as an addendum to this testimony.

At one time or another, everyone here has said that there's too much litigation in Superfund, too much mistrust, too little cleanup. And many have also agreed that a major cause of all these problems is the retroactive, site-by-site system used to raise cleanup funds.

Your Committee is being asked to continue more than a $1 billion a year in current taxes, and to raise hundreds of millions of dollars more in taxes. You are the checkwriters for this program -- you should therefore have confidence that the money is wisely spent.

Yet, you are here today seriously considering a bill drafted by the Administration which will keep this failed system in place. Moreover, the bill contains provisions that would further complicate the complicate the legal warfare and that would divert hundreds of millions of dollars that could be used for cleanup.

The Clinton Administration touts this bill as representing a "consensus" among Superfund stakeholders. However, I am here to tell otherwise. H.R. 3800 does not begin to represent the concerns and troubles of the thousands of affected parties residing beyond the Beltway. This bill, in the strictest sense, is a political agreement crafted by an exclusive group of players -- EPA and only a limited circle of Superfund stakeholders.

Theirs is a view glimpsed from Washington's corridors, not from toxic ground zero -- the communities and people living with Superfund risk every day. In Washington, the talk is of making "polluters" pay and of "fair share" allocation.

At toxic ground zero, the talk is of one thing: Clean up our neighborhood, do it fast and do it right. Communities want to see cleanup crews and public health professionals, not lawyers, allocators and allocation committees.

I encourage you to read H.R. 3800 very closely. After a thorough read of the bill, I am sure you will agree that not all stakeholders benefit from the bill or its financing priorities. The consensus of Superfund stakeholders supporting H.R. 3800 grows even smaller when you begin to consider the bill's various provisions.

In order to garner support for the bill, the Administration has cut special deals with some favored business and municipal constituencies. The bill also buys off opposition from others with complicated compromises. But what it does not do is fundamentally reform Superfund to make it work to protect the citizens living near toxic

waste sites.

Impact on Citizens Living Near Sites

Residents living in and around Superfund sites have an intense interest in the Superfund reform debate, but for the most part lack the formal organization to participate effectively in Washington. That will not be true when this so-called reform plan fails to achieve meaningful results, amounts spent on cleanup from the Trust Fund at sites without PRPs are cut, and a groundswell of public outrage lights up district message centers across the country.

As ex-EPA Administrator Bill Ruckelshaus recently noted, citizens who live near Superfund sites are among the most alienated Americans he has seen since the Vietnam War; "they don't think anyone cares." The Administration bill will not change that. Indeed, after this fierce reform debate, it may aggravate it.

Yet, H.R. 3800 says: "More than $1 billion in new commitments to reduce current PRP liability, but not a dime to increase cleanup spending."

Citizens are already angered by the lack of faster cleanup. Under HR 3800, they will continue to be. The bill's liability allocation provisions, even if they succeed, will not stop the legal battles over money. Indeed, they will increase PRPs' current incentives to delay cleanup and fight over the costs of remedies, by making such resistance cheaper. Citizens will be angered at the slowdown in cleanup at orphan sites, where there are no PRPs to pay for cleanup but which are most often located near poor and minority communities, because the Trust Fund will have be drained for other priorities. They will realize that by emphasizing liability allocation procedures, "orphan share" funding at sites with viable PRPs, and devoting all the new taxes to reducing current PRP liability, lawmakers have placed a higher priority on reducing PRP costs than on site cleanup.

A closer review of the bill reveals many areas where citizens lose, specifically:

- It does not fundamentally change the disastrous process that has failed to clean up sites for the last fourteen years.

- Rather than a new focus on public health, it leaves battles between EPA and PRPs (and among PRPs) over money as the dominant issue at most sites. Almost every one of the changes proposed to reduce these battles has been within EPA's discretion since 1986.

- It leaves in place the current incentives for PRPs to fight remedy selection decisions, and to delay cleanup. It only focuses on cost allocation.

- While reducing the liability of huge PRPs by hundreds of millions of dollars per year, it provides not one dime of increased funding for cleanup, especially at orphan sites.

- It promises more citizen participation in the process, and resources to make that effective, but doesn't provide new financing. And it doesn't remove the reasons why EPA and PRPs resist community involvement today: the money battles.

- It calls for more and faster public health assessments, with more community input, but again provides no new financing.

- If its new promises are all funded, it could reduce current cleanup spending from the Trust Fund by over $500 million per year, because it provides no new financing sources for these new promises.

- It has rhetoric about community development, but has no training programs, no contracting opportunities, no focus of existing programs on harmed communities,

and no liability change to stop the incentive to avoid "brownfields."

Environmental justice concerns cannot be addressed by a section heading at the back of a bill. Our concerns are not "add-on" items. The central environmental justice concern is how the central purpose of Superfund -- clean up -- is carried out. This requires fundamental reform.

I feel absolutely certain in saying today that if you enact this bill, which fundamentally maintains the current law with the current financing system, you will come back here in a few years, long after the congratulations and smiles at the bill signing, explaining to citizens, but probably not very persuasively, what went wrong. In other words, you may be able to pass a bill which does not fundamentally reform Superfund, but, if you do, you most assuredly will not solve the problem.

We say it's time to make fundamental change in Superfund. And change -- and boldness -- is what ASAP's Eight Point Plan is all about.

Very clearly, citizens do not win under this bill. As it now stands, the Administration bill includes promises for more public participation, site reprioritization, public health initiatives and environmental justice, but they are empty promises for two simple reasons -- no new funding accompanies them, and the dynamics which prevent them have not been changed. When new programs are authorized but not newly funded, money must be taken from some other program. This means that if these initiatives were funded, cleanup spending would likely decrease. And that is directly counter to the goal of more and better cleanup.

As the proverbial checkwriters of this very important program, I encourage you to fully study H.R. 3800 and truly understand where the financing is coming from, where it is going to, and who really benefits from the inside deals. If you look at the attached chart, you will see that the financing priorities of H.R. 3800 are exactly backwards.

Financing Priorities

Let me describe the chart, working from left to right. First, the Superfund program spends about $1.5 billion per year. The rest of the chart shows increases and decreases from that base.

The key to understanding this chart is knowing what EPA does with the Trust Fund today. About $900 million to $1 billion of the total is spent on cleanup related work today. The rest is spent on lawyers and enforcement, research, and overhead. $200 million of the cleanup money is spent for emergency removals. The balance of $700-800 million is the only source of cleanup money for orphan sites, which tend to be located in poor and minority communities.

Cleanup is not happening in these communities because of shortages of funds in the Trust Fund -- those this cleanup account should be increased. But the opposite is done under H.R. 3800.

EIRF

You are being asked to vote new taxes of $500 million per year, rising rapidly to over $1 billion to fund a huge new business entitlement program. The Environmental Insurance Resolution Fund (EIRF) is the only new program in the entire Administration bill to be financed from new taxes. However, ironically, the EIRF provides no additional money for public health and cleanup programs. It has nothing to do with cleanup -- indeed EIRF money gets paid out to PRPs even if they are fighting the Government at every site. The hundreds of millions of dollars in new taxes (on insurers) will be used only to reduce the existing liability and past expenses of solvent PRPs. Worse, the new tax revenue will pay for past PRP costs, including PRP legal fees dating back to 1981.

Orphan Share Fund

The bill sets aside $300 million directly from the $1.5 billion cleanup fund -- not new sources -- for an orphan share fund. This fund finances the shares of identified parties who are insolvent or defunct plus MSW generator and transporter shares that exceed the 10 percent cap, and the excess shares of parties with an inability to pay. The Orphan Share Fund is not directed at orphan sites -- the sites without PRPs where Trust Fund money is needed the most. It simply reduces the liability of the big companies which EPA pursues today.

But there are no new financing sources in the bill to pay for this.

From the beginning of the idea of a special orphan fund, which was proposed by the National Commission of Superfund last fall, every proponent swore that it would be funded by "new money" and would not reduce the current Trust Fund's resources. Quite obviously this is not happening. Indeed, in anticipation of the passage of H.R. 3800, the Senate Appropriations bill just cut the discretionary part of the Superfund Trust Fund from $1.5 billion to $1.2 billion.

Again, valuable cleanup dollars are being spent on reducing the liability of solvent PRPs, rather than being spent to improve the health of many communities. Clearly, the Administration is putting saving businesses money ahead of cleanup.

Increased Government Transaction Costs

Due to the series of additional burdens the new liability allocation process places on the Government, we estimate the Government's own transaction costs will increase by approximately $50 million. This will have to come out of the current, fixed pot of the Trust Fund, just like the Orphan Share Fund.

Unfunded Promises

As mentioned above, the Administration bill attempts to add citizen acceptance to the bill by promising various citizen and public health programs. The bill proposes unfunded programs with a total price tag of $160 million more for community and health needs ($13 million for ATSDR, $40 million to subsidize PRPs' use of innovative technologies if they fail, $50 million for Citizen Information and Access Offices and $60 million for technical assistance grants to community groups). Among the additional unfunded promises/programs are community working groups support; increased research, development and training demonstration grants, and assistance to state voluntary cleanup programs.

However, no new financing is provided for any of these programs. If the government should follow through with its promises and provide financing for the various programs, that can only come out of current Trust Fund spending on cleanup. The Senate just added another unfunded promise to buy the support of a citizen's group: authorization to spend the Superfund on primary health care clinics at sites.

I know some citizen leaders are supporting HR 3800 because they were promised new programs. The bill's supporters ought to be honest with them about the absence of new financing.

Impact on Trust Fund Cleanup Spending (assuming promises are not funded)

The orphan share fund is mandatory; it has a first claim. EPA and DOJ transaction costs will have to go up or the whole system of H.R. 3800 will collapse. Only counting these changes, the Trust Fund money available for cleanup will be reduced by $350 million annually -- or thirty five percent.

Impact on Trust Fund Cleanup Spending (assuming promises are funded)

If the rest of the new promises are fully funded, the Trust Fund money available for cleanup will be reduced by over $500 million annually -- half.

This is an outrage.

A Better Alternative -- the Eight Point Plan

I encourage you to consider carefully the lack of funding in this bill. If you simply rubberstamp this bill, you will simply be approving a tax hike on insurers -- a tax which finances a fund that is not even spent on cleanup, while reducing cleanup funds.

Instead, I encourage the Committee to look to alternative mechanisms where these additional monies can be used directly to improve the health and well-being of hundreds of communities across the country.

Tomorrow a bi-partisan group of Representatives will introduce a comprehensive Superfund reform bill, one that will work.

It will increase the number, speed and efficiency of cleanups, protect public health and the environment, reduces wasteful conflict and transaction costs, provide for greater public participation and community empowerment, and promote economic redevelopment. These initiatives and programs are financed through increased taxes on business, replacing the failed site-by-site retroactive liability system. Our bill substantially increases spending on cleanup, and provides the funding for new initiatives.

On behalf of ASAP, I urgently request that you review our bill, and that you vote to create new taxes and new fees, but condition your funding increases on the program being fundamentally reformed along the lines of the ASAP comprehensive reform bill.

Why Businesses Support Increased Business Taxes to Fund Superfund

The business members of the Alliance for a Superfund Action Partnership (ASAP) and thousands of other businesses across the country support increased broad-based business taxes in exchange for the elimination of retroactive, site-specific Superfund liability.

Early this year the Business Roundtable formally voted to support up to a doubling of the Environmental Income Tax "if necessary" to support liability reform. (Some of its members now strongly support the Administration bill because it gives them huge liability reductions without paying any increased taxes!)

The reasons why so many businesses support higher taxes in exchange for reforming retroactive liability are straightforward:

- Business today spends around $4 billion a year on NPL Superfund sites, but cleanup spending generally is about at $2.3 to 2.5 billion. Over $1 billion a year is wasted on lawyers, litigation quality testing and other non-cleanup activities because of Superfund's retroactive liability system.

- Augmenting the $4 billion spent by business are the economic consequences of the uncertainty created by the Superfund liability system and the length of time it takes to resolve how much each PRP owes.

- Some very large PRPs can absorb the uncertainty caused by contingent Superfund liability, but most of the 32,000 PRPs now tangled in the process find it difficult. For most, the uncertainty impedes investment and management decisions and impairs access to capital.

- The U.S. Small Business Administration earlier this year said that "any meaningful reform of the liability scheme must include elimination of retroactive liability for waste disposal prior to January 1, 1987. Small businesses generally were not required to maintain records of waste disposal prior to that date. Otherwise, small businesses are placed in the inequitable position of defending their actions without records."

- The number of businesses affected will swell as more sites proceed into the PRP identification phase and new sites are brought into the system. A tax-based financing system will establish a rational, well defined and well understood funding scheme for the Superfund program, as well as a finite budget.

- In the aggregate, businesses support a tax-based approach because it would be far more efficient than the current site-by-site financing battles. It would cost the business community no more than it currently is paying (and probably less), and more would be spent on cleanup and the other important priorities ASAP has.

There is no secret to this widespread business support for liability reform. The current system hurts them. They therefore are offering more money to address the cleanup concerns of affected communities if they can be relieved of the uncertainty and huge legal fees that the present system imposes on them. It seems to me inconceivable that Congress would not respond to taxpayers who are asking to be taxed and to a plan that promises more and faster cleanup of our communities.

it is for these reasons that conservative Republicans like Senator Bob Smith and Rep. Bill Zeliff have introduced legislation doubling the EIT and raising insurance taxes to replace retroactive liability.

Conclusion

The failures of Superfund are well documented: the unconscionably inadequate cleanup record, the staggering waste of public and private resources on legal and liability battles, the disenfranchisement of citizens which erodes confidence in government at all levels, and the suppression of economic dreams as entire communities wait, and wait, and wait for action.

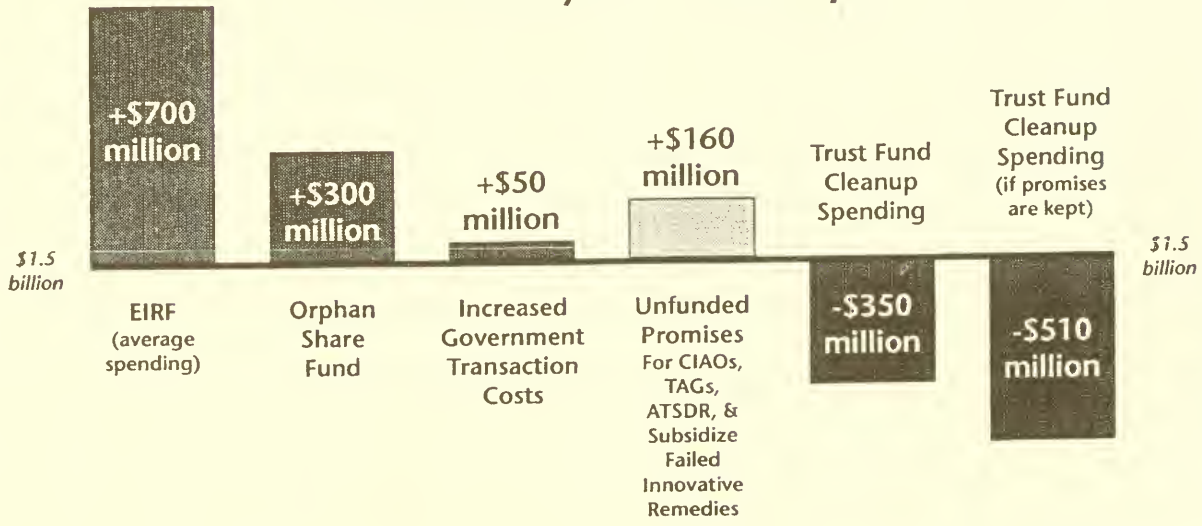
Let us not settle for reform which falls well short of addressing these problems. Enactment of a bill is not what should drive us. Instead, we should only settle for a bill that truly gets the job done. We would prefer no bill at all to one which perpetuates in the name of reform many of the injustices and failures in place today.

Let us not mistake cobbling together a bill which satisfies some vocal and visible constituencies for a bill which will result in a successful program. Such a bill may be politically feasible, but if it doesn't work, it's not much help to anyone.

Thank you. The members of ASAP and I look forward to working with you.

H.R. 3800: THE WRONG PRIORITIES

Less Money For Cleanup



Change in annual funding caused by H.R. 3800

CURRENT MEMBERSHIP LIST

Alcan Aluminum Corporation

American Furniture <R>Manufacturers Association

American International Group

Bailey Corporation

Carolyn Bell, CEO, <R>Community Health Resources, Inc.

Chelsea Clock Co.

Continental Corporation

Electrical Apparatus Service Association

Grocery Manufacturers of America

Industrial Compliance, Inc.

Johnson Controls, Inc.

Hazel Johnson, Executive Director, <R>People for Community Recovery

Charlotte Keys, Executive Director, Jesus People Against Pollution

Lashins Realty Services Corporation

Local Governments for <R>Superfund Reform

Mayor Bill Campbell, City of Atlanta

Michael McIntosh, President, <R>McIntosh Foundation & Founder, National Commission on Superfund

National Association for the Advancement of Colored People (NAACP)

National Food Processors Association

Nestle USA

Olin Corporation

Phillips Petroleum

The Rabanco Companies

Shell Oil

Society of Independent <R>Gas Marketers of America (SIGMA)

Texaco Inc.

Acting Chairman GIBBONS. Mr. Smith.

STATEMENT OF RICHARD D. SMITH, PRESIDENT, CHUBB CORP., WARREN, N.J., ON BEHALF OF COALITION FOR A SOUND INSURANCE RESOLUTION FUND

Mr. SMITH. Thank you, Mr. Chairman. My name is Richard Smith, and I am president of the Chubb Corp., a property and casualty insurer.

With me today is Robert Morrescotti, director of taxes for Chubb and vice president of the Chubb Corp.

My testimony today is in support of a coalition of six insurers, part of the 19-member American Insurance Association, Superfund committee. Although we would prefer retroactive liability reform, our coalition supports H.R. 3800 and the Resolution Fund which it would create under that designation.

There is, however, a sharp division between the AIA and among the entire insurance industry over the basis on which we should bear the cost of financing the fund.

The administration has submitted to you a fair proposal. Seventy percent of the financing would come from a fee imposed on certain premiums written from 1971 through 1985, a retrospective element; and 30 percent would come from a tax on current premiums going forward, a prospective element.

The coalition which I represent supports that proposal as a compromise. If the Fund is created, the vast majority of this industry favors a retrospective fee. The 13 remaining AIA insurers disagree and have chosen to polarize this issue by insisting on a 100 percent prospective tax.

Our coalition believes strongly that a predominantly retrospective fee is a necessary element of that funding. The logic and equity of our position are simple. H.R. 3800 retains the retroactive liability of the original Superfund bill of 1980. It follows that the funding mechanism should be based on the market share of those insurers writing commercial policies from 1971 through 1985, the period of greatest exposure for retroactive liability.

Instead, 13 insurance companies, representing only 27 percent of the tax base before you, insist exclusively on prospective tax on their future business at the very same time that many of the same companies have reduced or continue to reduce their market share. This prospective tax proposal is a bold attempt to escape their fair assessment for policies they wrote during the years that are specifically addressed by the Fund created under H.R. 3800.

In short, they are asking to you allow them to walk away from their liability. It is simply not fair to permit those insurers who will receive the greatest benefits to shift the cost of that relief to those who do not face the same magnitude of Superfund litigation exposure.

Many disputes in the drafting of H.R. 3800 were resolved between sincere and skillful advocates through resort to compromise. There is no reason to depart from an artful compromise on the taxation issue. And we, therefore, urge that you adopt the proposal of Treasury embracing a 70–30 retrospective/prospective split under H.R. 3800.

This administration bill provides a real breakthrough in moving the expenditure of money out of litigation into the cleanup of dump sites across the Nation. For 13 insurers to assume at this late date a posture which provides them with the ability to shift to others the responsibility and cost for business which they wrote in the 1970s and early 1980s is not responsive to any fair and reasonable course of conduct.

I therefore urge you on behalf of this coalition to reject the path of extremism and to endorse instead the concept of compromise suggested by the administration and the Treasury in its proposal before you.

[The prepared statement follows:]

TESTIMONY OF RICHARD D. SMITH, PRESIDENT
CHUBB CORPORATION

INTRODUCTION:

I am Richard D. Smith, President of The Chubb Corporation. I am here today appearing on behalf of the Coalition for a Sound Insurance Resolution Fund. Our coalition is comprised of the following companies: The Chubb Group of Insurance Companies; CNA Insurance Companies; General Accident Insurance; GRE Insurance Group; Selective Insurance Group; and The St. Paul Companies. Together we represent approximately 11% of the U.S. premiums written for the insurance lines proposed by the Administration as funding sources under the provisions for inclusion in Title IX of H.R. 3800 for financing the Environmental Insurance Resolution Fund (EIRF). The EIRF, discussed more fully below, is a fund created in Title VIII of H.R. 3800 for the purpose of settling disputes between potentially responsible parties under Superfund and their insurers based on commercial insurance policies.

We are here today to address the financing provisions of H.R. 3800, the Superfund Reform Act of 1994. At the outset I emphasize that our Coalition supports H.R. 3800. We have worked very hard as part of the American Insurance Association's Superfund Improvement Project to develop a workable and fair EIRF. Currently, however, there is a serious division within the insurance industry over the appropriate method for allocating the financing of EIRF.

The Administration's language provides that seventy percent of EIRF would be financed through a fee imposed on specified commercial premiums written from 1971 through 1985 (a retrospective element). The remaining thirty percent would come from a tax on certain commercial premiums on a going forward basis (a prospective element). Our Coalition supports this approach because it is fair, provides for a certain financing base and is workable.

INSURANCE INDUSTRY DIVISION:

Other than our Coalition, the property and casualty industry is divided into two groups as follows:

- 100% Prospective - This group consists of 13 AIA companies and some foreign insurers.
- 100% Retrospective - This group represents the balance of the insurance industry.

The prospective group's 13 insurers over the past few years have substantially decreased their market shares, to write approximately 27% of the EIRF base. Their parents along with other foreign insurers would benefit from the elimination of litigation under the EIRF. However, under their prospective proposal their tax will be substantially less than their pre-1986 market share and thus less than what their exposure under Superfund would in fairness demand. The companies favoring 100% retrospective currently write approximately 62% of the EIRF base. Some of these companies have opposed the creation of the EIRF, but favor a retrospective fee if the EIRF is enacted into law.

The Coalition for a Sound Insurance Resolution Fund believes that a compromise is in order. The Administration's language proposing a 70% retrospective fee and a 30% prospective tax, provides a fair distribution of the financing burden. We are, like most of the industry, strongly opposed to the 100% prospective "walk away" proposal insisted on by the 13 companies. Any financing for EIRF should contain a significant retrospective element for the following reasons.

FAIRNESS REQUIRES THAT THERE SHOULD BE A SIGNIFICANT RETROSPECTIVE ELEMENT TO FINANCING EIRF:

In 1980, Congress passed the Comprehensive Environmental Response Compensation and Liability Act, or Superfund. The purpose was to clean up hazardous waste sites according to the rule that parties responsible for the pollution should be accountable for the clean-up. Superfund established a strict, joint and several and retroactive liability scheme for potentially responsible parties (PRPs), that is often criticized as unfair. Unfortunately, the result has been

an enormous amount of litigation and relatively little clean-up. This wasteful litigation includes suits between PRPs and their insurers. PRPs facing clean-up costs often assert that liability for these claims is covered under their insurance policies. These suits result in heavy transaction costs.

Title VIII of H.R. 3800 is intended to substantially reduce these transaction costs by making offers to settle insurance coverage disputes between insurers and eligible PRPs. See generally, H. Rept. No. 103-582, Part I at 73-78, 155-157.

The settlement scheme in Title VIII of H.R. 3800 covers potential liabilities created prior to 1986. Title VIII, by creating the EIRF, establishes a settlement fund for disputes between PRPs and their insurers. A PRP may bring claims for insurance indemnification to the EIRF. The EIRF may offer a settlement based on a variety of criteria to pay a percentage of the claim. If the PRP accepts, it must agree to forgo litigation. Importantly, however, the EIRF applies only to sites which received hazardous waste prior to 1986, and only to policies written prior to 1986. See H.R. 3800 Sec. 802 (8) (15).

Currently, coverage disputes over policies written during this time - pre-1986 - result in insurers winning some cases, PRPs winning others, and settlements in still other cases.[1] Prior to 1986, certain commercial policies included coverage for sudden and accidental pollution. In 1986, these policies were amended to absolutely exclude pollution coverage whether from gradual or sudden and accidental pollution. Addition of pollution coverage now requires a specific endorsement.[2]

Thus, there is far less potential for Superfund clean-up coverage liability based on commercial policies written subsequent to 1985. Partly in recognition of this fact, the EIRF specifically applies only to insurance coverage "for any period prior to January 1, 1986." H.R. 3800, Sec. 802 (15). The EIRF provides money from defendant insurers to plaintiff PRPs through the financing in Title IX. Settlement offers are made in partial satisfaction of specific alleged coverage disputes dealing with pre-1986 acts and insurance coverage. In exchange, the PRPs accepting offers from the EIRF forego specific litigation significantly reducing or eliminating litigation costs, reducing the potential liability of the insurance industry and creating greater certainty for insurers and PRPs.[3] We believe that it is not coincidental that the bulk of the financing for EIRF in the Administration's language is based on a retrospective fee applied up to January 1, 1986.

Indeed, fairness requires that those with the exposure, who would obtain the most relief from Superfund litigation through EIRF, should pay the greater portion of the financing. A purely prospective tax would unfairly shift the burden of this potential liability from those who face the exposure to insurance companies and their insureds who may have little or no Superfund clean-up exposure. Those with the most exposure but who choose to write less coverage currently could essentially "walk away."

For example, market share data for 10 large companies' "other liability" insurance premiums (one of the funding lines) reveals a combined market share decline from 35.4% in 1971 to 22.5% in 1992. These companies with serious pre-1986 exposure are leaving the exposed lines. Without a significant retrospective element to the EIRF financing, companies with little or no exposure, or who didn't even exist prior to 1986, would bear an increasing burden. A retrospective element is necessary to ensure that those with the exposure to pre-1986 potential liability fairly shoulder the costs of the EIRF's pre-1986 settlement procedure.

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[1]See generally, M.L. Lanthrop, Insurance Coverage for Environmental Claims Sec. 3.100[2] (Matthew Bender 1994).

[2]Issues in Insurance, CPCU 10 Vol. II (American Institute) (4th Ed. 1987) at 212-13.

[3]See, Title VIII Secs. 804-807; H. Rept. No. 103-582, Part I at 157-162.

A PURELY PROSPECTIVE TAX WOULD RESULT IN TAX BASE UNCERTAINTY:

Aside from being fair, the retrospective portion of the Administration's language provides a sound tax base and a predictable revenue stream. A company could not avoid or "game" the tax because the base is already established.

In contrast, however, a prospective tax will lack predictability. Since the mid-1980's, more corporate insureds have been moving toward large deductibles or "self insured retention" programs. Others have established captive insurers or joined risk retention groups. Risk retention groups, self insurance, higher "reinsured" deductibles avoid generating premiums. Insurance companies make money by charging service fees to manage the risk or "reinsurance" premiums to help assume some of the risk. Claims adjusting, actuarial and risk analysis services are provided to insureds on a fee basis.

More than 2/3 of the Fortune 500 companies had formed captive insurers by 1987.[4] The drive to this kind of managed risk came from the liability crisis in the second half of the 1980's. The result is avoidance of state premium taxes, state guarantee fund charges and participation in state mandated risk pools. In the future, more insurers will be offering these kinds of services to take the place of, or supplement, corporate insurance needs.[5] These kinds of risk management programs are not subject to the Administration's financing.

A 100% prospective tax, aside from being a victim of managed risk techniques, will also add to the incentives for moving away from traditional insurance. The result will be an increasing threat to the prospective tax base.

In fact, as indicated under the discussion of fairness, an individual company or companies with significant potential exposure could essentially escape taxation, by reducing premium writings on a going forward basis and moving into providing services. As indicated, there are a number of large companies who during the last several years have significantly reduced their property and casualty writings. The danger of insurers with exposure leaving the market is particularly acute concerning non-U.S. insurers. Those who have significant Superfund exposure could avoid financing their own relief under EIRF by simply reducing U.S. writings, creating uncertainty in the tax base. Those with the exposure could walk away from it and pay little or nothing to run off this potential liability.

A RETROSPECTIVE FEE IS ADMINISTRATIVELY FEASIBLE:

The retrospective fee described in the Administration's language is administratively feasible. A.M. Best has published data from which the retrospective base can be determined. That data was published using the methodology described in the Administration's language. The Best's data represents a clear, accurate picture of the retrospective base and can be used to determine the fee.

CONCLUSION:

While the relief afforded by EIRF is essentially retrospective in nature, some prospective element is not inappropriate. Interestingly, the 70/30 ratio roughly corresponds to the ratio of the industry on either side of the issue. Many disputes in the drafting of H.R. 3800 were resolved between sincere and skillful advocates through resort to compromise. There is no reason to depart from an artful compromise on the taxation issue. The fair and equitable conclusion is for a compromise with a substantial retrospective element to the tax.

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[4]Issues in Insurance, CPCU 10, Vol. II, M.M. Porat, Captive Insurance Companies: Concepts, Developments and Risk Management Applications, (American Institute) at 305.

[5]See generally, Insurance Company Operations, CPCU 5, Vol I, (American Institute) at 19-20.

Acting Chairman GIBBONS. Mr. Mascotte.

STATEMENT OF JOHN P. MASCOTTE, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, CONTINENTAL CORP., NEW YORK, N.Y., ON BEHALF OF AMERICAN INSURANCE ASSOCIATION

Mr. MASCOTTE. I am Jack Mascotte, chairman and CEO, Continental Insurance Cos., and the chairman of the American Insurance Association.

The Superfund program's unfair imposition of retroactive liability leads to the waste of hundreds of millions of dollars in litigation fees each year and threatens our industry with billions in potential exposure in those State courts which may misinterpret our old policies.

While most at this table I think agree that retroactive liability is an expensive, wasteful and unfair idea, we obviously disagree with the prospects for its repeal. The majority of AIA believe that the President's bill, built on a series of constructive agreements between traditional foes, including chemical and manufacturing companies, small businesses, insurers and environmental groups, represents the best chance for Superfund reform, and we support it.

The time to fix Superfund is now. This year. Before yet more businesses are threatened and before yet more communities face delayed cleanup. That is why, at the request of the administration, we negotiated with our policyholders and created the Environmental Insurance Resolution Fund, or EIRF, title VIII of the President's bill. It provides a streamlined way for insurance to do its part of the cleanup. We have agreed to contribute the $8.1 billion that will be necessary to finance EIRF, provided that money can be raised on a fair basis.

The issue before the committee today then is how to assess the insurance industry the $8.1 billion that we have agreed to pay. Here we disagree with the administration's initial take on this question, and we do appreciate the openness to another solution indicated by Secretary Bentsen before the Senate and by his representatives who testified here earlier this morning.

We respectfully recommended that the tax be fully 100 percent prospective. There are many simple but profound arguments we believe for such a decision. Let me simply cite three.

First, it is a long-standing tenet of sound tax policy that people should be able to plan tax consequences into their future financial affairs.

I know this committee struggled with much criticism and reluctance over imposing 8 months of retroactive tax just last year. Consider that the retroactive proposal for EIRF funding amounts to taxing people for their business activities between 9 and 23 years ago.

Second, the retroactive tax would create winners and losers within this industry. It would create different effective tax rates. Companies bearing the higher effective rates would be saddled with higher taxes and thus less able to compete.

Even more devastating is that current accounting principles require that any retroactive tax must be booked immediately. The effect is that the entire retroactive amount, potentially billions, would be wiped off the balance sheets of the insurance industry im-

mediately—even though the payments will be collected over many years.

Some companies would be crippled by this sudden reduction in their capital position, and all those affected would be constrained to write less insurance since the amount of insurance you can write is a function of your financial strength. The net effect will be a reduction in available insurance.

Unlike others who have testified, we don't ask for a competitive advantage through the design of the tax. Their request is simple. They want to gain a marketplace advantage through a tax that will be disproportionately borne by others. We seek just the opposite. We ask that the entire $8.1 billion be raised with a single rate across all commercial insurers.

The third reason is that the prospective tax is much simpler to design, administer and collect than a retroactive tax. Specifically, current taxpayers are easily identified and the tax simply imposed. In contrast, a retroactive tax would create complex administrative problems figuring out which companies wrote taxable lines and for which years for each year starting in 1985 and going back to 1971.

Moreover, many companies which existed in the 1970s no longer exist today. Others have changed ownership, in many instances more than once, and all of that would have to be untangled. It would be an administrative nightmare.

All four of the current Superfund taxes are prospective. All four of them. The insurance industry should not be singled out for disparate treatment.

In fact, this committee wrestled with this issue before and decided it correctly before it created the first set of Superfund taxes in 1980. At that time, some argued that the chemical feed stock taxes and oil taxes which financed Superfund should be designed so as to tax more heavily those who made more of those products in the past.

You rejected that argument for the same sound reasons listed above. Being retroactive, it would have violated sound tax policy and planning. It would have picked winners and losers and distorted the marketplace for those products, and it would have been extremely difficult to administer while not accurately reflecting culpability.

It is a rarity for an industry to say tax us, but the majority of members of AIA strongly support the administration's bill, and we have worked long and hard to get it thus far. It would be ironic if we at AIA, the very organization that helped design this unique solution to the Superfund litigation nightmare, had to withdraw our support because of a tax design which favors financially those who have opposed its progress.

We at the AIA are proud of our role in creating a good, sound way to resolve our disputes. All we ask is a level playing field among ourselves for future competition. That is the way to keep policyholder costs down and the risk transfer market strong. Help us get on with the job and get our eyes off the rearview mirror.

Thank you.

[The prepared statement follows:]

Statement of
John P. Mascotte
American Insurance Association

Before
The Committee on Ways and Means
United States House of Representatives

July 25, 1994

My name is John P. Mascotte. I am chairman and CEO of Continental Corporation, based in New York. I am also chairman of the American Insurance Association for whom I am testifying today.

The American Insurance Association ("AIA") is comprised of 270 members companies who write more than 35% of the country's commercial property and casualty insurance coverage. As a result, the AIA and its member companies are intimately familiar with the impact of Superfund on the insurance community and on business in general.

AIA supports reauthorization of Superfund this year. The AIA also supports the establishment of the Environmental Insurance Resolution Fund ("EIRF"), a new fund proposed as part of the Administration's pending Superfund reauthorization legislation. The EIRF is intended to promote settlement of claims between insurance companies and Potentially Responsible Parties ("PRPs") under the Superfund program. While the EIRF is not a complete solution, it is a constructive step towards limiting the unproductive and costly litigation which has pervaded the Superfund cleanup effort. In turn, it would channel precious funds to the companies financing the actual cleanup of the federal Superfund sites.

AIA is prepared to support funding of the EIRF through federal premium taxes of $8.1 billion over a ten-year period, which taxes would be imposed on the commercial property and casualty industry. The AIA is willing to support this funding approach only if these taxes are imposed on an even, fair and prospective basis. I will review the pending Superfund tax proposals of the Administration and then provide the position of the AIA on each component.

The Administration's proposed reauthorization of Superfund includes the following tax proposals:

- First, a prospective federal premium tax imposed on future insurance premiums for the commercial multiperil line of business, the product liability line of business, the commercial fire line of business and certain other liability lines.

- Second, a federal premium tax imposed retroactively on insurance premiums written for the period 1971-1985. This retroactive tax would be imposed on insurance companies each year for at least the next five years, and probably the next ten years. The tax would be imposed on the commercial multiperil line of business and certain other liability lines for the retroactive period 1971-1985.

- Third, the scheduled expiration on December 31, 1995, of the taxes imposed by sections 59A, 4611, 4661, and 4671 of the Internal Revenue Code that fund the Hazardous Substance Superfund would be extended. The taxes would continue to apply to taxable years beginning before January 1, 2000.

The position of AIA on each of these proposed taxes is set forth below.

AIA Supports Prospective Premium Federal Tax

The AIA supports the Administration's proposal to impose a prospective premium federal tax as a means to fund the EIRF. We would recommend that the Committee on Ways and Means consider broadening the lines of business subject to the tax, as appropriate, so as to provide a broader tax base to support the fund.

AIA Opposes Retroactive Premium Tax Proposal

AIA strongly opposes the retroactive federal premium tax proposal for the following reasons:

- Long-recognized sound tax policy clearly dictates that tax changes generally should be prospective, not retroactive. This policy is based upon the sound judgment that taxpayers should be entitled to rely upon the current state of the law when planning personal, business and financial transactions. The soundness of this argument is dramatically illustrated in the case of the retroactive premium tax proposal which, if enacted, would be tantamount to a tax rate increase retroactive to 1971, i.e., over 23 years retroactive.

- All other Superfund taxes - the petroleum and chemical feedstock excise taxes, and the Environmental Income Tax ("EIT"), are prospective in nature. The Superfund excise taxes are imposed without regard to historic sales volume or whether the companies paying the tax are, or are not, identified as Superfund polluters. The result is that all taxpayers with Superfund tax liabilities are treated similarly, i.e., they are subject to prospective taxation. Insurers subject to an insurance Superfund tax should be treated no differently.

- A retroactive tax would distort the insurance marketplace and place many major companies at a substantial competitive disadvantage. Newly formed insurers or those with modest premium volumes during the 1971-1985 period would advertise their exemption from the retroactive premium tax as a competitive advantage to attract both investor capital and customers. The likelihood of this competitive disruption is particularly heightened when one considers the highly competitive nature of the insurance industry.

- A retroactive tax necessarily will affect insurers unevenly and thus function as a direct levy on their capital and surplus. Enactment of the proposed retroactive federal premium tax would effectively reduce capital and surplus by $5.1 billion upon enactment. Given the general relationship between capital and surplus on the one hand, and capacity (or premium volume) on the other hand, the net result would be an instant reduction in premium volume or insurance capacity of approximately $15 billion annually. This effect would potentially impact insurer capacity for all lines of business, including the personal lines of auto and homeowners. A prospective tax, because it maintains the level playing field in effect at the time of its enactment, will have none of these highly undesirable consequences.

- Under Generally Accepted Accounting Principles ("GAAP"), companies would be required to take an immediate charge against earnings for the full amount of a retroactive tax payable, i.e., the entire 10 years of the anticipated life of the tax. This front-ending of the retroactive tax would negatively impact stock values of impacted companies and, in turn, inhibit their ability to grow and attract new capital.

- A prospective tax is much easier to administer and collect that a retroactive tax based on data as much as 23 years old. A prospective tax can be applied readily to foreign insurers accepting U.S. based risks.

- Finally, it may be suggested that a federal retroactive premium tax is somehow justifiable on the basis of the potential benefits which may be enjoyed by certain insurers as a result of the operation of the EIRF. This position is completely without merit as a basis for justifying a retroactive tax on all insurers for a wide variety of reasons. First, every insurer situation is somewhat different. Thus, any effort to enact a retroactive tax on a "fair basis" is impossible. Second, the reaction of the PRPs of various insurers to the EIRF offers will vary dramatically. It is already clear that in some cases the majority of PRPs of certain insurers will not accept the EIRF offer. Thus, any ostensible benefits to be derived through the reduction of litigation costs and other costs will not be realized. Third, the EIRF structure assumes that the merit of various claims by PRPs against insurance companies for environmental coverage are comparable, a position which clearly is not sustainable.

AIA recommends that the Ways and Means Committee delete the retroactive tax from the Superfund legislation and that the revenue be replaced through an increase in the rate of the proposed federal prospective premium tax. We believe this would cause the rate of tax under the prospective tax to increase to approximately 1%. A failure to make this change would cause certain AIA companies to oppose the proposed reauthorization of the Superfund and could threaten the ability of the AIA to support reauthorization.

Extension of Existing Superfund Taxes

The AIA supports the extension of the existing Superfund taxes which currently are utilized to fund the Hazardous Substance Superfund. We believe these taxes have generally operated in a reasonable manner to generated much needed revenues for this important program.

Borrowing Authority for the EIRF

In addition to the modifications proposed above, the AIA also recommends that the Committee on Ways and Means extend limited borrowing authority to the EIRF. We believe that this borrowing authority is necessary to insure that the obligations of the EIRF will be satisfied as they become due. Moreover, we believe this borrowing authority is necessary to encourage PRPs to accept the EIRF settlement offers as a means of terminating the wasteful litigation currently ongoing in this area. In order for the EIRF fund to be legally viable, at least 85% of potential claimants must agree to accept the EIRF offer. In order to achieve this 85% acceptance level, it will be necessary to demonstrate that funds will be available as EIRF obligations come due. We are concerned that in the absence of the borrowing authority, the 85% threshold will not be achieved. If this occurs, the EIRF will terminate. We believe that the borrowing authority can be limited and structured in a way that guarantees that the borrowing will be repaid in full through the funding mechanism adopted by the Congress. Thus, we propose that the borrowing authority be operated under the following constraints:

- First, the borrowing authority would be limited to $200 million at any point in time.

- Second, the borrowing authority would be further limited by reference to the tax receipts anticipated from the EIRF federal premium taxes for the succeeding 12-month period.

- Third, repayment of the borrowing authority would be guaranteed through inclusion of a provision which would automatically extend the effective date of the EIRF federal premium tax beyond its scheduled termination if any unpaid EIRF borrowing exists at that time.

We believe that these limitations would effectively limit any potential repayment risk to the federal government associated with this borrowing authority while at the same time ensuring that funds will be available in the EIRF so as to encourage PRPs to participate in the EIRF.

In closing, I would like to reiterate that the American Insurance Association, whose members write a substantial portion of the country's commercial insurance, supports reauthorization of Superfund this year. We are willing to accept $8.I billion in new taxes to fund the claims settlement facility proposed by the Administration as part of the reauthorization. We agree that we should do what we can to channel funds to cleanup instead of litigation. All we ask is that Congress impose this new tax liability prospectively and evenly based on future premiums of all commercial insurance companies.

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Acting Chairman GIBBONS. I think I have to admit that I don't know a lot about this subject. I have been exhibiting my ignorance here. But am I to understand that there is no such thing as environmental insurance anymore?

Mr. GREENBERG. No, there is environmental insurance now, but it is designed specifically for companies. The rates are reflective of the exposures. Principally, it covers sudden and accidental losses, but they are designed to meet the needs of the marketplace in the environmental field. What we are dealing with here, as you know, Mr. Chairman, is the past.

Acting Chairman GIBBONS. Well, what is so magic about 1985? What triggers that date?

Mr. GREENBERG. Because after that date the insurance industry put in a specific, much clearer pollution exclusion which negated much of the litigation that took place between 1971—policies issued between 1971 and 1985 where the courts have gone both ways in determining liability based on the policy language. In some courts, they have tortured the English language, and in others they read it clearly as it was expressed.

Acting Chairman GIBBONS. Do all insurance companies now write the same environmental exclusion? Is it a standard form among the 50 States?

Mr. GREENBERG. I don't think it is all the same. I think each company may have its own language, and each writes its own forms of policies. Not—the whole insurance industry does not provide environmental impairment coverage. AIG is one company that does.

Acting Chairman GIBBONS. Mr. Greenberg and—Mr. Wallace, I really don't understand your position. You are asking us not to do anything, as I understand it.

Mr. GREENBERG. We are not saying that at all.

Mr. WALLACE. Greenberg or Wallace?

Acting Chairman GIBBONS. Mr. Wallace.

Mr. WALLACE. No, sir. I am not asking you to do nothing at all. What I am basically saying is if the committee is going to go through the strenuous and perhaps controversial process of raising taxes, that the taxes should be raised and spent for a good purpose.

The purpose of the EIRF tax is, one, to resolve these old disputes. At the same time that these old disputes would be resolved with the new money we would propose that a different program should be put in place to spend the new money, if any, and at least spend the same old money that we have been spending in the past as a minimum on cleanup. In other words, we want to see the money go to clean up, as opposed to it going to resolving litigation or other disputes between PRPs and insurers.

Acting Chairman GIBBONS. Mr. Greenberg, how do you respond to the argument made by, say, Mr. Mascotte over there, that a retrospective tax is unfair because it cannot be passed on in the form of higher premiums to current customers, thereby creating a competitive advantage for new companies that have entered the business?

Mr. GREENBERG. That is a strange argument. What really is being said is that those companies that favor a prospective tax

want to pass on the liabilities they have, the claims they have outstanding, to others in the form of a tax.

I mean, if we are going to do that—if we are going to do that, as I said earlier, for this form of coverage, we have a number of classes that we underwrote many years ago that didn't turn out the way we had hoped, and I would be glad to see if we could help find somebody to pick up those losses as well.

Mr. MASCOTTE. Mr. Chairman, at the risk of asking you to rephrase your question, I think there has been attention paid here to this notion of pass through as it relates to a prospective tact or retroactive tax that misses basic economics.

Costs are costs, Mr. Chairman, and whether those costs are taxes that are going to be prospectively calculated or retroactively calculated, any business will try to pass to the extent it can in the marketplace those costs whether they are past or future. So I think it is a false argument to suggest that somehow you are doing justice or injustice in terms of where the ultimate burden in society is going to rest from whether the tax is prospective or retroactive.

I would take it that my colleagues here at the table agree that retroactivity as respects liability is a bad idea. I am hard pressed to understand why retroactive taxation is a good idea when we are taxing a bad idea. But, most importantly, what is critical here is that there is a connection being drawn in the proposal of 70–30 that somehow insurance companies are culpable for these past activities. And it is that assumption that we can, as Mr. Samuels tried to say, do rough justice and calculate where that retrospective burden ought to be laid that is at the basis of AIA's proposal that it be prospective.

Mr. GREENBERG. There are many classes of business that underwrite in this country where the outcome is different than what we anticipated. Courts interpret policy form language differently all the time than the underwriters had originally believed. That is part and parcel of what the business is.

Now, I would agree that retroactive liability for the PRPs under the original Superfund law was really a punitive law, and it was alien to our whole legal system.

But the current bill that the administration has proposed has retained retroactive liability in order to determine the amount of recovery that a PRP would get. You have to go to their insurance coverage to determine that. So are we going to have retroactive liability holding the PRPs responsible but then shift the cost of that to insurance companies who had nothing whatever to do with those original liabilities?

That hardly makes any sense. We either have to be consistent—if we are going to retain retroactive liability, you have to retain the principle of letting the claims fall where they may and tax accordingly. I mean, how do you split this? It doesn't make any sense.

Mr. SMITH. May I add one other comment, Mr. Chairman?

Retroactive liability, which I think it is true none of us at the table here favors it, but as necessarily—the situation is that we have to deal with it because it is the current law and it is a part of the administration's bill.

But when you look back retroactively, that is the source of all the litigation that we are talking about under this bill. And that litiga-

tion is what is giving rise to the cost that the EIRF is attempting to discharge and take care of.

And it would seem to me it is impossible to create a level playing field in the future or at the present time for a disparate time of liability and exposures that existed retroactively. So if you are going to be fair about how you are going to assess that cost, then you have to pay attention to what companies and what risks were assumed by those companies back in that 1971 to 1985 area because they are the primary beneficiaries of this EIRF bill. They are the ones that will have most of their litigation costs terminated.

So that if you had a large market share historically, then you really have to be concerned about the future and the companies that today are diminishing their market share, picking up a small part of the cost for this bill. It is not a fair manner of discharging that responsibility.

Mr. MASCOTTE. Mr. Chairman, this issue of level playing field is a legitimate one. Let me pose a couple of questions about how one would try to construct a level playing field in a retrospective tax.

First, you would have to make the assumption that all the various States have concluded these issues the same way, but we know that is not true. We are talking about 20, 40 and 60 percent graded rates based on Texas as opposed to Florida as opposed to California. A company under this bill that wrote insurance in States with nothing but the best advantage would be treated exactly the way as those companies who concentrated their business in a State like California where the State courts have been much less favorably disposed.

Two, suppose you are an insurance company that wrote commercial premiums on nothing but retail shoes stores and another company of the same size and substance that did nothing but do chemical plants. Again, this notion of going back retrospectively would assign the same level of tax to both.

Third, and most importantly to me—I think this is in many ways the most ironic of these processes—take two companies of identical size with exactly the same amount of liability to their policyholders in environmental claims. One company has been aggressive. It settled all of those claims in the last 10 years and has none left. The other company hasn't settled of any those claims. It has dragged its feet and preferred to pay lawyers to delay the payment of those claims.

In both of those instances this retrospective tax would tax the company that itself paid all those claims exactly the same way as the company that had not paid any of them.

I don't think any of us disagree that we ought to try to be fair, but the question is how in this process to you create a process of fairness? And we think—not all but the majority of members of AIA believe that the fairest way to do that is not pretend that you can get over those complexities in the past. You do it simply with a broad-based prospective tax.

Mr. GREENBERG. On the question of retail shoe stores and chemical companies paying the same, I don't think it is quite that way. The premiums for chemical companies would have been considerably higher than those for retail shoe stores. And, hence, if market

share would be the determining factor on premiums, those with the higher premiums are going to pay a higher tax.

Mr. MASCOTTE. On the other hand, a primary insurer would pay a whole lot higher premium than an excess liability carrier. We find ourselves in these layers of distinction about how to construct fairness going backwards that I think would be devilish.

The members of the committee have expressed in their questions of the administration officials that testified here before your great concern about how you are going to construct this process and do it with some kind of fairness. The simplest fairness is to simply admit that you can't go back and do this with any kind of consistency in the past, and the best way to serve rough justice—if I can steal that phrase—is to do it on a prospective basis.

Acting Chairman GIBBONS. I have more questions for you all, but I better go to Mr. Pickle next.

Mr. PICKLE. Mr. Chairman, let me just ask one question.

The panel of five here, just show the hands of those who think that we ought to do this prospectively? Those of you then that think we can do it retrospectively.

Mr. WALLACE. Mr. Chairman——

Mr. PICKLE. The third question is, can you do it by a blend or a combination of some other way? Mr. Smith.

Mr. SMITH. I was going to say I definitely favor a blend.

Mr. PICKLE. How would a blend work? Can you give me a quick description how a blend could be set?

Mr. SMITH. A blend is a recommendation of Treasury. They have offered you a blend in their proposal, and I think their proposal is based on—and they have gone through in their testimony—70 percent retrospective and 30 percent prospective.

Mr. PICKLE. That is what you mean by blend, 70 and 30?

Mr. SMITH. That would be a blend between the two positions here. I think the position of at least one person at the table here is 100 percent with no blend. And I think, ultimately, this entire bill has been built on—constructed on the art of compromise, I think. So you are going to need compromise to reach a solution here between these two opposing positions.

Mr. PICKLE. We sure will. Mr. Wallace.

Mr. WALLACE. I am the only member of the panel who is not from an insurance company. I represent a coalition that does include some insurance companies, but I wanted to make sure that you understood there was a fourth alternative, and that is the alternative that my coalition uniformly represents and that is that this entire tax—the EIRF tax—is a bad idea.

That as opposed to spending 700 million new dollars on average per year starting out $500 million in the first year and growing to $1.2 billion, that the Congress should not do that. That if there are to be new taxes and new money, that should be spent on cleaning up those communities.

We have gone 14 years and only claim to have 237 communities cleaned up. About 30,000 communities exist out there. Even at that rate, it would take us another 1,400 years to clean up the communities.

And so, as opposed to passing a new tax that is not related to cleaning up the communities and other proposals in this bill which

will reduce the spending available for cleanup by $510 million per year, we are proposing more fundamental changes to the program.

Mr. PICKLE. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Fine. Mr. Houghton.

Mr. HOUGHTON. Thank you, Mr. Chairman.

You know, it is awfully hard to sort of sort out these issues, whether it is an accounting issue or a market share issue or whether it is a fairness issue or what it is. Let me just ask a couple of questions here.

I would like to ask a question of Mr. Mascotte. You talk about if this thing goes retrospective you got to book it immediately. But don't you sort of set up reserves all the time? If you have a tax coming into your income statement, don't you have a reserve set up to take care of things like that so it is dulled in terms of the immediate impact?

Mr. MASCOTTE. Congressman, if this were a more settled area of law, I think your observation is exactly right. You set up a case reserve for each one of your claims and then you estimate those claims for which you have not yet been formally notified with what we call an incurred but not reported or IBNR reserve.

Unfortunately, because of the complexity of this area and because of the legal morass, the actuarial society has yet to be able to determine how to estimate a company's environmental claims.

A recent article by one of the leading analytical firms that studies our industry, Best's, estimated that the insurance industry was underreserved in terms of future impact of environment claims by perhaps as much as tens of billions of dollars.

So I think it is not fair to say that the calculation of a retrospective tax would then simply allow us to transfer reserves that are currently established on known cases—so-called case reserves—in order to cover this.

There would be, as I tried to set forth in my testimony, in our view be a significant need for us to follow generally accepted accounting principles, impose a substantial one-time new reserve in order to cover the implications of the retrospective proposal as set forth in the legislation.

Mr. MCDERMOTT. Will the gentleman yield for one clarification—for one clarification?

Is not the SEC already pressuring you to set up in your financial statement reserves as evidence of your dealing with this issue?

Mr. MASCOTTE. Congressman, it is, but they are, of course, asking us to do this on the basis of actuarial analysis that we apply to our respective books of business. And there are very few companies in this entire industry that have established and incurred but not reported. That is an unknown but probable cost to the cost of environmental claims.

I don't think anybody in the industry, anybody at this table, would say that this industry is fully and adequately reserved on the subject of environmental claims and that the only thrust of this law would be to shift the establishment of those claims from one type of reserve to another. If you make this tax a retroactive tax, you are going to wind up driving up on a one-time, immediate basis the amount of reserves held by the industry. That may be a good

thing to do or it may be a bad thing to do, but it is clearly what is going to happen.

Mr. MCDERMOTT. Could you explain why as these lawsuits developed you didn't begin putting them into your financial statement?

Mr. MASCOTTE. It is not a question of not identifying those cases which we already have. It is the problem of saying out of all the policies written from 1986 and prior, who will invent a claim that has not yet come forward. It is the incurred but not yet notified that constitutes the huge problem.

Mr. MCDERMOTT. Thank you, Mr. Chairman, Mr. Houghton.

Mr. HOUGHTON. Go ahead, Mr. Greenberg.

Mr. GREENBERG. I think that different companies have reserved differently. It is not a uniform practice. And some companies are much better reserved than others.

There is another issue here. The companies that now want a prospective tax collected the premium, many declared it as profit, and now that losses have been incurred at a future date want to take those losses and shift them to somebody else. They declared the profit in earlier periods.

Mr. HOUGHTON. I know my time is expiring, Mr. Chairman, but maybe I could just ask one more or maybe two more questions if there is enough time. I would like to ask this of Mr. Greenberg.

Mr. Greenberg, good to see you, as always. You know, the issue that is hard for me to wrap my arms around is why an insurance group would relish a new tax at all. The proposal contains a new Environmental Insurance Resolution Fund. Why is this desirable for some of the Hartford companies who wrote the business prior to 1986? And how does it affect them and how does it affect foreign companies or associations like Lloyd's?

Mr. GREENBERG. Well, first of all, we believe that the proper solution—and I think most at this table would agree—that retroactive liability per se was wrong in Superfund. It was a punitive law and a punishment law because many PRPs were disposing of wastes under laws and regulations that were proper at the time they were disposing of those wastes. And then retroactively laws or regulations changed, and they were held accountable to the new standards.

As a result of that, they then looked to their insurers to pay the costs that they were assessed. And, as you know, that led to endless litigation and has resulted in what is now supported by some under EIRF.

We still as a company—and many others—I said about 75 percent of the insurance industry don't agree with this proposal but believe that dealing with the fundamental issue of retroactive liable per se would be the right way, and then to have a broad-based tax covering everybody in the economy who benefited from economic progress that took place during that period would be the proper way of dealing with this. And spend the money on cleanup rather than on litigation. That has always been the recommendation of overwhelming numbers of the industry.

Now, under the current proposal, as I indicated in my oral testimony and the submitted papers, we believe that foreign insurers are going to benefit enormously under the proposal that currently is before you because they were the principal underwriters of ex-

cess liability where the liability amounts were great but the premiums small.

And if you tax on the basis of premium, they will pay a very small amount. They have massive amounts of liability which will be shifted to the domestic companies.

I think that is unfair. I think that domestic shareholders should not be picking up the responsibility for others.

If this bill were to pass into law, I would buy into champagne companies because they are going to pop a lot of corks overseas.

Mr. HOUGHTON. I have one more question, and I promise, Mr. Chairman, if you allow me to ask it I will not have another question on the second round.

Acting Chairman GIBBONS. Well, that is a good promise.

Mr. HOUGHTON. I would like to ask this question of Mr. Wallace. You know, what you suggest is very intriguing. Whether the tax is retrospective or prospective, one of the problems is to get at the issue, do the cleanup.

And you have assembled some interesting charts here. The pluses look pretty good. The minuses don't look so good. What do you do to change that around? We have all been wrestling with that. Is it some special elixir that have you got?

Mr. WALLACE. I am glad you asked that question. It gives me an opportunity to talk a little bit about our positive proposal as opposed to our criticism of the administration.

I believe the administration has presented this bill as a consensus, and in response to questions already I think you have heard three insurance executives give you three different answers, and you have heard myself as a noninsurance person but representing a coalition to give you yet a fourth answer.

And I think Mr. Greenberg alluded to it earlier, the real problem as we see it in this program—I am an environmental lawyer and have been for 20 years and was around prosecuting at the Justice Department when Love Canal came about and was a part of the legislative process that creates the real monster in this process which we believe is retroactive strict joint and several liability. Retroactive meaning it goes in reverse, strict meaning you don't have to have any liability or responsibility or culpability, and joint and several meaning if you are responsible for any of it you are responsible for all of it.

Under our eight-point plan, what we would propose to do is for the Congress—not necessarily this committee only—but the Congress to attack the real problem, the retroactive liability. And under a scheme like that, we have come up with a taxing proposal where this committee could enact less new taxes. There would be some shifting in the current program spending where we estimate that you could spend about a half billion dollars more on cleanup than the half a billion dollars by our estimates that you would spend less on cleanup under the administration's proposal.

Mr. HOUGHTON. Thank you. Thank you, Mr. Chairman.

Mr. SMITH. May I comment a second, Congressman, on that?

No one welcomes the tax. You can be certain of that. The problem with the entire issue that we have before us is the litigation and the cost of that litigation. And I think, as realists, having been through many series of litigations in this country concerning toxic,

asbestos and other types of liability arising or attempting to be driven home under a policy of insurance, we have learned that the ultimate result of that litigation is usually not happy.

And although today we are in a 50–50 situation on the decisional law in that litigation and the coverage issues, the ultimate result, we think, makes it worth our while to try to resolve the litigation issue in this painful, not-so-happy compromise, rather than allow it to go on to what we think will be an ultimately adverse decision for all of us.

And if that should come about on the coverage issue, then it remains for us to be exposed on the limits of the policies. So, obviously, we need to address the litigation issue primarily, and I think that is what gave rise to the EIRF principle of trading off the cost of litigation for the tax and the elimination of that exposure. I think that is the reality of our situation today.

Mr. HOUGHTON. Thank you very much.

Acting Chairman GIBBONS. Mrs. Kennelly.

Mrs. KENNELLY. Thank you, Mr. Chairman.

I agree with what you just said Mr. Smith, and I understand that your group at one time agreed with the AIA on prospective and then you changed your mind. Would you mind telling us why?

Mr. SMITH. Well, I believe the situation is this: I am Chairman of the AIA Superfund committee and remain so. I recused myself on this single issue of taxation. I worked hard with this committee to establish the EIRF and to reach that proposal with the administration.

I never supported the concept of prospective tax as a 100 percent noncompromise situation. I always argued that, in order to be reasonable, we must reach a compromise here in taxation as we did in all of the other issues when we dealt with the administration and the PRPs.

And it was only when we were met with an absolute position, an extreme position, of 100 percent or no support for the EIRF that I changed our position and adhered to the concept of a blend or a compromise on retrospective prospective taxation.

That was not a change in our position in the true sense. It was just an evolution process, and I thought all the while we were arguing for the creation of EIRF. Ultimately, we would have the same spirit of compromise when we reached the taxation issue. Sadly, that was not the case. And that is why I am here in the position that I am in today.

Mrs. KENNELLY. So you recused yourself on the question.

Mr. SMITH. Of taxation only.

Mrs. KENNELLY. Now, what is the board's position right now?

Mr. SMITH. On taxation?

Mrs. KENNELLY. On Superfund.

Mr. SMITH. On Superfund, I think you can say—are you talking about the board of AIA? The board supports the EIRF and supports that remedy and supports that proposal of the administration.

On the issue of taxation, the board voted 13 to 6 against—for, rather, 100 percent prospective tax. The remaining six companies voted against that proposal and in favor of a compromise.

Mrs. KENNELLY. And you are in the six.

Mr. SMITH. I am in the six. That is where we are today.

Mrs. KENNELLY. I heard you and Mr. Greenberg talking about the unfairness of retroactive liability. And I think that is something that we all can understand. But we know that the Energy and Commerce Committee reported out unanimously that we would have retroactive liability so it really is not worthwhile talking about that because it just is not going to happen.

Because if you had that taken away, the only other answer would be a broad-based tax and that is just not going to happen in this climate. So that is why we have got to struggle with what we have got in front of us today.

And I just read your testimony, Mr. Greenberg, and you are talking about how it would be so unfair if a company would open up today and then find itself liable for something that happened back then.

And that maybe wouldn't be fair, but do you think it is fair that a company writes insurance and then all of a sudden the United States Government establishes a Superfund which never was foreseen when they were writing the insurance and then they are liable for these activities and you say 100 percent retroactive?

Mr. GREENBERG. Congresswoman, first, let me be clear of a question you asked Mr. Smith. Seventy-five percent of the insurance industry opposes prospective tax. The AIA doesn't speak for the insurance industry. I want to be clear about that. Only 75 percent of the AIA supports a prospective tax. This represents 25 percent of the property casualty industry.

Mrs. KENNELLY. I know that. And I also say to you, isn't it true, since you are not involved, you probably would get a good advantage by having it go retroactive 100 percent and you not being involved would have an advantage in the marketplace?

Mr. GREENBERG. I don't know what you mean. We are the largest commercial property casualty insurer in the United States. We are a very big underwriter. We will have some liability under retrospective, but we were a small company then. We did not underwrite those same policies that the companies who are lobbying for a prospective tax did then. They wrote the policy, got the premium, declared the profits and now want to shift—want to shift the responsibility to somebody else. I find that incredible in this country.

Mrs. KENNELLY. I find that trying to find a solution.

Mr. GREENBERG. You asked the question on retroactive liability. You say that the Commerce Committee has voted out and is not going to change retroactive liability. Then you must follow that same train of thought through. You have to go to their insurers. And what are you going to say? We are going to have some part prospective but some part retrospective? It is fair to be retroactive on the question of responsibility for the PRP but not that way for the insurance industry? I find that kind of strange, don't see the logic in it.

Mrs. KENNELLY. Just a few more minutes. Well, let me ask you something. You want 100 percent retroactive?

Mr. GREENBERG. Yes.

Mrs. KENNELLY. If, in fact, and certainly I wouldn't be in agreement with this, but if that happened, would you then, in support the tax and support this bill?

Mr. GREENBERG. Probably not, because I think the bill is flawed. I said so in the beginning. We probably have been the first company, insurance company in the United States, for the last probably 7 or 8 years that spent lots of money on advertising to bring to the attention of the American people and the Congress the lack of progress that was being made in cleaning up sites.

We did this as a public policy issue. We didn't have the greatest liability in this area, but it was pointless to see these millions, if not billions of dollars being wasted on litigation, and we were spending the money in the courtroom and not on the sites. I still believe, as Mr. Wallace has testified, that retroactive liability is wrong. I think that as a legal principle it is wrong, but if you are going to pass that as a law, then clearly you have to be consistent on the question of those who underwrote the policies and got the premiums and grabbed the profits. They are the ones who bear the responsibility. You can't shift that.

The trust fund concept is well established, asbestos collected funds that have the liability. Breast implants is not going to be collected from companies who underwrote shoe stores or boat manufacturers. They are going to go to the heart of that. If you are going to shift the responsibility, why pick on those insurers who didn't write those policies? Why not any other industry in the United States? It doesn't make any—where is the logic in it?

Mrs. KENNELLY. I understand that you have had a great hand in addressing this whole question. I know you had a proposal yourself a couple years ago that had a broad-based tax as the solution. But I would just say to you the facts are on the table, but I would just hope that we would be awfully careful that when we have $8 billion that we don't tip this thing over and then nothing happens. Thank you, sir.

Acting Chairman GIBBONS. Let's see. Mr. Hancock.

Mr. HANCOCK. Thank you, Mr. Chairman. Mr. Greenberg, you that indicated basically regardless of which way the taxes go——

Mr. GREENBERG. I didn't hear that.

Mr. HANCOCK. I said you have indicated that you don't like the bill period regardless of how the taxes are structured, is that correct?

Mr. GREENBERG. I don't support personally as a company the EIRF—we would propose the elimination of retroactive liability and a broad-based fee that would be a pass-through fee to a broad-based group in the United States.

Mr. HANCOCK. You are talking about something just like a premium tax then, earmarked——

Mr. GREENBERG. It would be an identifiable pass-through.

Mr. HANCOCK. I understand what we are attempting to accomplish here. That is, we're trying to eliminate the litigation that is going on. Can't the industry do that? Why can't the industry resolve this problem without Congress? Do they just want to sit and argue and spend time with the environmental attorneys? How much activity has there been and cooperation within the industry to solve that problem?

Mr. GREENBERG. Well, I think there has been a great deal, but as you have heard today there were insurance companies that underwrote considerable amounts of coverage in the earlier years,

and have the liability for the Superfund cleanup costs that are being passed on to them by their insurers, and that is where the litigation begins, and, obviously, to try and resolve this we believe it is unfair to say, well, let's relieve them of part or all of that liability, then shift it to somebody else who really is more or less an innocent bystander.

The fact that you are in the insurance industry shouldn't make you any more responsible than somebody who is running a grocery store. I mean, I find that—I find the linkage, because the term insurance is in the title of the name of your company, hardly is the basis for incurring a new tax.

Mr. MASCOTTE. Congressman, I would simply say, again, that while Mr. Greenberg has a point with respect to the shifting of costs, I would also argue that those companies that really have tried to resolve and be responsible to eliminate litigation, who have moved promptly with their insureds to settle these claims are going to be punished if this tax is retrospective because having already paid to settle those claims, we think we are out of that position or predominantly out of it, but in effect we are going to have to pay the tax all over again as it is constructed, if it is retrospective.

Mr. SMITH. Congressman, if I may, I think realistically there are very few companies coming forward saying they are out of this exposure. The fact of the matter is that we are all engaged in litigation all over the Nation. We would, whenever the occasion presents itself, certainly be interested in compromise of that litigation, one over one, but to bring the entire body together and get it resolved by compromise is an insurmountable task. It just hasn't worked. This proposal that you now have as part of the administration bill is an effort to get at the difficulty that exists in trying to reach it by compromise.

Mr. HANCOCK. Thank you.

Acting Chairman GIBBONS. All right. Mr. McDermott.

Mr. MCDERMOTT. Thank you, Mr. Chairman. Mr. Smith, can you talk about your efforts to compromise inside your group? Did you participate in the decision by the Treasury to go 70-30 or was that done up at Treasury without consulting you?

Mr. SMITH. That was done in Treasury without consulting me. It was announced to the group that was trying to work out this with the administration, to work out the entire EIRF proposal, it was announced as the proposal of Treasury.

Mr. MCDERMOTT. Did you then sit down among yourselves and try to work out an agreement, something different than what the Treasury had come up with?

Mr. SMITH. Very differently did try to reach a compromise separate and apart from Treasury's compromise, yes.

Mr. MCDERMOTT. Why didn't it work?

Mr. SMITH. Well, it didn't work because there was an opinion on the part of, as you see, 13 of the 19 members, that there was to be no compromise, that it was to be 100 percent prospective.

Mr. MCDERMOTT. If we were to reverse, throw out the Treasury proposal and accept the proposal of 100 percent prospective, is it your opinion that some people could then walk away from their responsibility totally?

Mr. SMITH. I think if you were to make it 100 percent prospective, and that were to become the law, then I believe that people who have assumed most of the policies during the period of time that we are talking about here, 1971–86, and wrote the premium and accepted the premium would then have an opportunity to walk away from the ultimate liability because the tax regressed on those who did not write the premium at that time or who wrote a far less amount of premium, and the company that I represent is in that category, and they would assume most of the liability then for the tax.

Mr. MCDERMOTT. Mr. Mascotte, I listen to that, and then I think to myself, well, if I were an insurance company and I had this great big tail of liability hanging out there, the best thing to do would be to get out of the business. Are any of your firms in the midst of reducing and getting out of that line of business?

Mr. MASCOTTE. The shifts in lines of business, Congressman, come for a variety of reasons company-to-company. I don't think one could point to a specific line of business and say there is a scarcity or an emerging scarcity of this particular line because of the potential burden of environmental tax. The single exception to that would be the area that the chairman already asked of Mr. Greenberg, and Mr. Greenberg responded, I think, very accurately that there is a limited number of policies today that specifically do provide pollution coverage, but the great issue here really is this timing of really the effect of exclusion and all of us are operating going forward on the basis and the assumption that unless we consciously go out and write a pollution coverage policy, we are not in effect going to be tagged with these problems going forward, so it is not a problem, a growing and emerging problem in today's market. It is a problem of in effect fixing the past.

Mr. GREENBERG. Mr. McDermott, I would like to clarify a couple of things. First of all, many of the companies in the AIA who voted for the prospective tax have far less market share today than they had then. They have been reducing their business one way or the other so they would pay less tax and hence shift that burden to those who didn't at the time. They were small at the time. Second, foreign companies who have lots of liability who don't write in the United States today would escape completely.

Mr. MCDERMOTT. So if a company—you are saying that companies have lost or given up market share, however one wants to pose it. More aggressive companies have come in doing property casualty things, and they would essentially—it would seem to me a corporately smart decision to sit down and say, let's get out of this business for a while and let things settle down. Is that not——

Mr. GREENBERG. Well, you know.

Mr. MCDERMOTT. That tail of liability. You would do that if you had written a lot of insurance in that period?

Mr. GREENBERG. I don't know what I would do, but I wouldn't be happy.

Mr. MCDERMOTT. Thank you, Mr. Chairman.

Acting Chairman GIBBONS. Mr. Kopetski.

Mr. KOPETSKI. No questions.

Acting Chairman GIBBONS. Mrs. Johnson.

Mrs. JOHNSON. Thank you, Mr. Chairman. Mr. Greenberg, I want you to know not only do I think your earlier proposal a few years ago was a very fine proposal and that I agree with you 100 percent on repealing retroactive liability, but I have for a couple of years publicly said to both my constituents and to my colleagues that I am interested a broad-based tax to fund cleanup. It is the only fair way to go. It is the only way to get through this thing, but there is not a lot of courage in Congress for it. So we are faced with a bill that doesn't do what fundamentally is necessary and important, not just for insurance companies, but for the little guys in the world who are really being hurt. I mean, I am watching people lose their life savings.

I am watching small companies owned by people who worked hard all their lives, family-owned businesses, get hurt. They want to sell their business and retire. They can't because their town is part of a four-town Superfund problem, not a business can turn over, not a house can turn over. You reach 65 you want to sell your house and move someplace else. You can't do it. The town's tax base is down.

Little towns spent as much last quarter on litigation costs as they spent on their entire special education. budget, and they got a 2 percent interest rate higher when they went out to bond their volunteer fire department building because they are a part of this big thing that we created and cannot stop, so I feel not a little about this. I have written legislation in this regard, and I feel very strongly that we are literally destroying the small contractor base in the industrial States of the Northeast where there is this kind of problem. And it is unintelligible to me why Congress can't deal with it, but that much said, your comment that these companies collected a premium, wrote the policy, made a profit and ought to pay now, I just can't go along with.

First of all, the law wasn't there until 1980. Second, in 1982 I fought like mad with Congress to help those companies who couldn't buy liability insurance for part B permits under the disposal of hazardous waste laws that we have, RCRA, and I know the market dried up. Why did it dry up? Because the courts suddenly said that you are responsible under the very policies you are pointing to not just for sudden instances like an oil spill, but for this kind of incidence that, frankly, nobody saw, nobody understood, nobody foresaw, and is very expensive. So the premiums they collected were for a much narrower purpose than the problems for which they are now being held liable, so I certainly would not equate the profit they made on the premiums they collected with the penalty that you are considering imposing upon them.

I have talked to hundreds of people in these Superfund cases, and they feel like they are in Russia. They are no better off than the people of the former Soviet Union under the most authoritarian Communist period.

They cannot even find out from their government what it is that their government thinks they contributed, much less quantity, so, of course, you have incurred, but not reported problems out there because nobody knows what was incurred and what was reported. They are still finding out. That is why all this litigation occurs. So why would you want to compound the sin, the catastrophe of retro-

active liability with retroactive taxes, especially when one can make a good case that the retroactive taxes in the 1986 bill was one of the primary causes of the collapse of the S&L system because we retroactively pulled out from under the S&L system the value of sometimes as much as a third of their portfolio.

Now, to go retroactively seems to me simply to repeat the mistakes of the past. I am certainly willing to work with you on a new tax. I have seen it figured out, for $500 per small business in America we could fund this thing. It is crazy what we are doing now. But I don't accept the simplistic logic of they collected the premium, they made the profit, and now we ought to make these taxes retroactive. Retroactive is wrong, and it will destroy an industry that I think has had a terrible time not just in environmental insurance, but in catastrophic insurance and a lot of other areas, so I think fairness demands 100 percent prospective in my mind, and you have to convince me otherwise. That is why I am asking this question, a modicum of fairness might be a split with 10 percent retroactive.

Mr. GREENBERG. Congresswoman Johnson, I agree with your emotion about the unfairness of the retroactivity in Superfund, and I have supported, as you know, a broad-based tax in lieu of that, and that would be shared by all Americans because they all benefited from the economic growth that took place. Having said that, because the companies who wrote the—the insurance companies that wrote and had large market shares at the time in general liability, excess liability and fire policies and didn't know that there were likely to be these problems, as occurs in many other classes of insurance, I might say, they did take this into profit because they didn't know that this was going to be an issue later on.

Now, companies who didn't write these at all, is it fair to say that those who didn't have a large market share then should be—who had nothing to do with that at all, they happen to be innocent bystanders, that they should pick up a major share, a lion's share in many cases of this new proposed tax? I find that rather strange logic.

Mrs. JOHNSON. I think basically what we are all faced with is how do we deal with something that we didn't understand, because your comment that they have insured for this is unfounded, nobody insured for Superfund. Dimensionally, there is no relationship between anything that has ever been insured for and underground pollution, there just simply isn't any comparison that you can make.

The earthquakes of California you insured for, you didn't expect so many, you didn't expect such big ones, but you did know it was possible and we knew from seismic information that it was likely to come. Nobody understood the dimensions of the problem of Superfund liability, so I think that to now get out of this by saying we will spread the burden, it is a broad-based tax on a smaller group, and what it does is buy out litigation costs and at least will speed along the process of the future and get to clean up.

Mr. GREENBERG. Congresswoman Johnson, there is plenty of examples. Asbestos wasn't expected, either, but there was a trust fund created and those who had the policies and the liability contribute to the trust fund. Those who didn't issue policies were left

out. Why would you want to bring in companies who had nothing to do with underwriting those classes of business?

Acting Chairman GIBBONS. All right. I think I understand the magic of 1985 because that is when the insurance companies got together with the insurance commissioners and rewrote their policies and excused themselves of any liability, but what is the magic of 1971? Why not 1921 or 1919 or anywhere? Why do you cut it off at 1971?

Mr. GREENBERG. There was no magic to 1971. It was just picked. It could go back to the 1940s and 1950s.

Mr. MASCOTTE. I think you would really have to ask the administration, Mr. Chairman, why they selected 1971. I would agree with Mr. Greenberg that it was very arbitrary.

Acting Chairman GIBBONS. It sounds like Congress made some pretty arbitrary decisions, that I don't think they understood too well. Now we are being asked to try to unscramble the arbitrariness that we didn't understand too well back when we did it, which is always tough.

Mr. SMITH. If I may, Mr. Congressman, I believe that the 1970 or 1971 date, from my recollection of the deliberations in front of the administration was arrived at by reason of the fact that there was an issue as to how you would prove insurance and whether you could establish that indeed you were insured and going back many more years would create a very complicated and difficult maze on the part of the PRPs to establish they were indeed insured. I believe that is how the compromise date came about.

Acting Chairman GIBBONS. Well, I know you taught me one thing, and that is I should have saved all those old insurance policies that I threw away years ago, but it is too late now. Well, thank you all very much. Appreciate your helping us with this problem.

Acting Chairman GIBBONS. We have Lloyd's of London, the London Insurance and Reinsurance Market, the National Association of Mutual Insurance Cos., the National Association of Independent Insurers, and Monsanto.

All right, Mr. Landgraf.

Mr. LANDGRAF. Yes, sir.

Acting Chairman GIBBONS. Go right ahead.

STATEMENT OF L. CHARLES LANDGRAF, COUNSEL, LLOYD'S OF LONDON, AND LONDON INSURANCE AND REINSURANCE MARKET ASSOCIATION

Mr. LANDGRAF. Thank you, Chairman Gibbons, and members of the committee. I am appearing today on behalf of Lloyd's of London and the London Insurance and Reinsurance Market Association or LIRMA. Given the misuse of Lloyd's name by a witness in the previous panel, perhaps Lloyd's of London needs no introduction except to say that Lloyd's has been in business quite reliably for 300 years.

LIRMA is a trade association of approximately 133 London-based insurance companies which also insure and reinsure commercial risks worldwide, as does Lloyd's of London. Together LIRMA and Lloyd's make up a part of the London market for commercial insurance risks which many business enterprises worldwide, including

in the United States, turn to for specialized risk underwriting skills and capacity, not for ordinary business.

Our clients support H.R. 3800, and in particular Title VIII, which would establish the Environmental Insurance Resolution Fund, EIRF. They understand the need for the EIRF and expect, contrary to suggestions this morning, to participate along with domestic and other foreign insurers and reinsurers in funding the EIRF settlement vehicle.

The most comprehensive and authoritative study of the property/casualty industry's exposure to environmental and asbestos liability claims was published this spring by A.M. Best Company, which is widely-recognized, indeed the preeminent rating organization for the U.S. insurance industry.

This A.M. Best study indicates that 70 to 90 percent of the total Superfund liability exposure for the insurance industry will be borne by domestic insurers and reinsurers and therefore that as much as 10 to 30 percent of this Superfund exposure, that is the balance, would ultimately find its way to foreign insurers and reinsurers through reinsurance or direct excess coverages, much maligned this morning.

The Lloyd's market and the LIRMA member companies, of course, represent only part of that total overseas market, and therefore collectively only a fraction of the 10 to 30 percent which best estimates ultimately becomes foreign exposure. Lloyd's and LIRMA, nevertheless, readily acknowledge that Superfund, as well as other U.S. environmental exposures, is a major concern for them.

For that reason, they have been active in the policy debate in Washington over the past 2 years, which has produced the National Commission on Superfund consensus recommendations and the extraordinary compromise reform which is now H.R. 3800.

We are not here to suggest to the committee today that you must adopt any particular funding mechanism, be it prospective or retrospective. We are here, however, to note that under Treasury's proposal, foreign insurers and reinsurers engaged in a trade or business within the United States are already subject to or would be subject to the retrospective fee and foreigners not engaged in a trade or business in the United States would be subject to a foreign-only fee based on maximum policy limits.

Contrary to the suggestion made by an earlier witness, Lloyd's underwriters have for decades paid U.S. income taxes through a closing agreement arrangement which treats them as if they are engaged in a trade or business in the United States. They fully expect to pay their share. Some LIRMA companies also have similar arrangements. However, scores of other foreign insurers and reinsurers face the threat of a confiscatory mechanism under the Treasury proposal.

We note that Assistant Secretary Samuels this morning has offered to work with us and other foreigners to perhaps cure some of the unintended confiscatory aspects of the mechanism for foreign insurers. We are not here to suggest that foreign insurers do not have a role in the funding or the particular type of funding. We do, however, endorse the comments of Mr. Mascotte on the previous panel as to the practical difficulties of any retrospective fee and, to

the extent the foreign-only mechanism is itself a function of the retrospective fee, those go away if you adopt a prospective fee.

We respectfully submit that any retrospective element which is adopted, if it is adopted, must be finite, readily calculable, and the period over which it is to be recovered must be definite and must clearly end without possibility of reopening well within the reauthorization period. We believe foreign regulators, to say nothing of foreign insurers, are entitled to at least that certainty on a retrospective revisitation of old business.

In our written statement, we have discussed in more detail those technical problems which we believe are presented by the special foreign aspects of the Treasury's proposal. We have sought to work with Treasury subsequent to their introduction of those materials and would welcome the opportunity to work with the committee and its staff in attempting to resolve those problems so that foreign insurers may participate in the funding of this vehicle without confiscatory or crippling competitive disadvantage.

Thank you.

[The prepared statement and attachment follow:]

STATEMENT
OF
L. CHARLES LANDGRAF
BEFORE
COMMITTEE ON WAYS AND MEANS

JULY 25, 1994

Chairman Gibbons, Congressman Archer, and Members of the Committee, thank you for the opportunity to participate in today's hearing. My name is L. Charles Landgraf and I am a partner in the law firm of LeBoeuf, Lamb, Greene & MacRae. I am appearing today on behalf of (1) Lloyd's of London and (2) the London Insurance and Reinsurance Market Association (LIRMA).

Lloyd's of London is an insurance market that for more than 300 years has underwritten a wide variety of commercial risks from all over the world. LIRMA is a trade association of approximately 133 London-based insurance companies which also insure and reinsure commercial risks worldwide. Together LIRMA and Lloyd's make up a substantial part of the "London market" for commercial insurance risks which many business enterprises worldwide, including in the United States, turn to for specialized risk underwriting skills and capacity.

Our clients support H.R. 3800, and in particular, Title VIII, which would establish the Environmental Insurance Resolution Fund (EIRF). They understand the need for the EIRF and expect to participate along with domestic and other foreign insurers and reinsurers in funding the EIRF settlement vehicle.

The most comprehensive and authoritative study of the property/casualty insurance industry's exposure to environmental and asbestos liability claims was published this spring by A.M. Best Company,[1] which is a widely-recognized rating organization for the insurance industry. This A.M. Best study indicates that 70% to 90% of the total NPL-site (Superfund) liability exposure for the insurance industry will be borne by domestic insurers and reinsurers and therefore that as much as 10% to 30% of this Superfund exposure would ultimately find its way to foreign insurers or reinsurers through reinsurance or direct excess coverages.

The Lloyd's market and the LIRMA member companies, of course, represent only part of the total overseas market, and therefore collectively only a fraction of that 10%-30% estimate of foreign exposure. Lloyd's and LIRMA, nevertheless, readily acknowledge that Superfund -- as well as other U.S. environmental exposures -- is a major concern for them. For that reason, they have been active in the policy debate over the past two years which has produced the extraordinary compromise reform which is H.R. 3800.

Our clients have studied each issue within the Superfund debate with open minds and sought to maintain the maximum flexibility possible so as to facilitate the consensus that is crucial to the success of Superfund reform. In keeping with that approach, we are not here to suggest to the Committee today that you must adopt any particular funding mechanism.

This material is prepared by LeBoeuf, Lamb, Greene & MacRae, 1875 Connecticut Avenue, N.W., Washington, D.C., who are registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as agents of Lloyd's of London, One Lime Street, London, England and the London Insurance and Reinsurance Market Association, 3 Minster Court, Mincing Lane, London, England. This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

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[1] "Environmental/Asbestos Liability Exposures: A P/C Industry Black Hole," Best Week: Property/Casualty Supplement (March 28, 1994).

Under Treasury's proposal, foreign insurers and reinsurers engaged in a trade or business within the U.S. are subject to a retrospective fee and foreigners not engaged in a trade or business within the U.S. are subject to a foreign-only fee based on the maximum policy limits. Lloyd's Underwriters have for decades paid U.S. income tax through a closing agreement arrangement which treats them as engaged in a trade or business in the U.S. A few of the LIRMA companies also have such an arrangement. However, scores of other foreign insurers and reinsurers face the threat under the Treasury's proposal of an open-ended "retrospective" fee and/or the singling out of them for confiscatory taxation with no viable alternative. This could well affect the reaction of home-country regulators and tax authorities to their insurers' participation in the funding scheme.

Please note: An indefinite or open-ended "retrospective" fee is, by far, the greatest single threat to a workable funding scheme. Other witnesses will offer contrasting views on the relative merits of so-called retrospective and prospective funding devices. It is not the role of foreign insurers to judge whether or not some retrospective element -- be it that proposed by Treasury or a more finite, fixed-duration "retrospective" charge -- is a political necessity in this legislation. But if a "retrospective" charge is imposed for some part of the funding, Congress should recognize that, at this late date, such a tax cannot possibly fall perfectly on the insurers or reinsurers that wrote the historical policies in dispute, whatever the virtues of that goal. The charge can only fall on the survivors, if you will, within that group, at best. Nor can it ever be levied in precisely the right proportion because any manageable retrospective base period is only a proxy for some other period. Moreover, focussing on the base period business written ignores the very real collective exposure of all current and future domestic insurers to pay through guaranty fund assessments for any insurer insolvencies which may be caused by the accumulation of Superfund-type exposures in the absence of this legislation. The biggest problem with a retrospective charge, in our view, however, is the threat that it might continue to hobble the "survivors" indefinitely, increasingly distorting the market artificially, creating greater accounting and financial anomalies as time passes, and -- not to underestimate the creativity of tax lawyers and accountants -- creating greater opportunities for the intended targets of the charge to restructure and avoid the obligation. On top of all of this are the inherent problems for foreigners of a "look-back" tax which depends on U.S. accounting entries no foreign insurer could have been expected to prepare some 20 years ago.

We repectfully submit that any retrospective element ultimately adopted must be (1) finite, (2) readily calculable, and (3) the period over which it is to be recovered must be definite and must clearly end without possibility of reopening well within the reauthorization period approved for the overall EIRF funding scheme.

We earlier used the phrase "open-ended." We commend the Treasury's realistic switch from a five year fund to a ten year fund, but notwithstanding that the fund will form only a part of insurers' total expenditure for cleanup in the U.S., we do not believe that the ten-year projection will exhaust the demands on the fund. Given the need for insurers to develop some certainty as to the extent of their retrospective obligations, this argues powerfully for an early phase-out of any retrospective portion of the funding.

We also wish to make a several observations about some severe practical problems that the Treasury's retrospective and foreign-only alternative fee proposals cause foreign insurers and reinsurers. No doubt the Treasury drafters were not aware of the severe, confiscatory effects of these new mechanisms. Nevertheless, if not ameliorated these proposals could amount to trade principle violations or even raise a Constitutional question.

I. The foreign-only fee, which is based on maximum policy limits, seems to be intended only as a lever to force foreigners not engaged in a U.S. trade or business, and therefore not otherwise subject to the retrospective fee, to elect to pay that retrospective fee. However, the foreign-only fee -- 1/2% of policy limits irrespective of actual premiums-- in many instances will be unrealistically confiscatory and would prevent foreign markets from providing insurance capacity to the U.S. economy, if adopted in its present form. In many cases this fee will constitute a significant portion of the premium, and in some it may even

exceed the whole premium charged for the coverage. This is not, I must stress, an idle or occasional concern. To illustrate, appended to this statement is a graph which displays layers of insurance limits and corresponding premiums for an actual general liability program for a U.S. mining company (name withheld) in which both domestic and London insurers participate. We asked a major international broker, independent of our clients, to select a representative general liability program for a Corporate America buyer, and we believe the terms of this program are representative of similar commercial liability programs for U.S. businesses; yet the graph clearly illustrates that proposed foreign-only withholding fee would consume a major portion of the total premium on all but the lowest layer of coverage and would exceed the total premium for the top layer.

While the Treasury proposal permits foreigners to elect out of the foreign-only fee by agreeing to be subject to the retrospective fee, it is unreasonable to assume that all foreign insurers and reinsurers will be able to make the election, and we must assume that some will in fact be subject to the foreign-only fee. Therefore, the fee must be equitable and not confiscatory, even if it preserves the election incentive. As the foreign-only fee is a surrogate for the retrospective fee it should be subject to the same funding targets and other limitations applicable to the retrospective fee to avoid creating an economic advantage and/or unlevel playing field for one segment of the industry over the other.

II. As already noted, the Treasury proposal permits foreigners to elect out of the foreign only fee and into the retrospective fee. The procedure for doing so however requires foreign insurers or reinsurers to enter into a closing agreement with the I.R.S., the requirements of which are not yet known. Between the time of making the election and entering into the closing agreement, the foreign insurer would remain subject to the foreign-only fee, and a withholding requirement is imposed at the full rate of 1/2% of the aggregate policy limits.

This improperly imposes a significant economic burden on cooperating foreign insurers and reinsurers and their U.S. insureds. We would recommend that a simpler election be made available; one which is effective immediately. To respond to concerns regarding I.R.S.'s ability to collect the fee from foreign insurers and reinsurers that are not engaged in a trade or business within the U.S., we propose a withholding mechanism on premiums[2] for the interim period between the time the foreign insurer or reinsurer elects to be subject to the retrospective fee and the time that the closing agreement is finalized. Such withheld amounts must be creditable against any retrospective fee liability. (The present proposal makes no provision for crediting, thus exposing cooperating foreigners to a double taxation under the maximum-limits withholding and the retrospective fee.)

III. Foreign insurers and reinsurers that are engaged in a U.S. trade or business, as well as those foreign insurers and reinsurers who are not engaged in a U.S. trade or business but elect out of the foreign-only fee, will be subject to the same retrospective fee as will be applied to the U.S. insurance industry. The determination of the retrospective fee is based on the net premiums from certain specific lines of business written during the years 1971 through 1985. The Treasury proposal defines these premiums by reference to the annual statement approved by the NAIC which is required to be filed with the insurance regulatory authorities of any state. However, foreign insurers and reinsurers that are not engaged in a trade or business within the U.S., as well as many of those that are, were not required to prepare and file NAIC statements, or anything remotely similar thereto, during the relevant period.

As foreign insureds and reinsurers did not create such reports during the relevant period, and most cases did not keep comparable records as to the types of commercial policies written covering U.S. risks, it would be extremely difficult for them to calculate their base period commercial net premiums exactly in the same manner as domestic

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[2] The last U.S. person who remits the premiums to the foreign recipient has historically been made the agent with the withholding responsibility under other sections of the Internal Revenue Code where withholding on a foreign person has been required.

insurers and reinsurers. Imposing this requirement on foreigners subject to different account regimes, with different currencies, will make it that much more difficult to determine the tax base. Add to it the complexities that arise because of events that have happened since 1971 including, mergers, reorganizations, insolvencies, portfolio transfers, acquisitions and dispositions, and you have the makings of an administrative nightmare for both the companies trying to determine their liability and for the IRS in its efforts to collect and administer the fee. In order that foreign insurers and reinsurers be able fairly to determine the retrospective tax scheme we propose that they be allowed to submit a "reasonable approximation" of base period commercial net premiums, subject of course to audit verification. The IRS' evaluation of whether the approximation is reasonable would include consideration of the efforts and expense required to obtain the information necessary to calculate base-period commercial net premiums, and whether the necessary information is available from records maintained by the foreign insurer or reinsurer in the normal course of business.

All of these administrative problems arise because of the retrospective fee and the need to provide a mechanism to get cerain foreigners into that fee system. To the extent the funding proposal is recast to rely on "prospective" fees, all of these complexities go away. If only from administrative considerations, therefore, a prospective fee or at least greater reliance on the prospective element, would necessarily be much preferred many foreign insurers and reinsurers.

Please do not misconstrue our clients' comments regarding administrative impracticalities and the limitations they impose, with an unwillingness on their part to contribute their fair share to the EIRF. I assure you they remain committed to do so and our clients sincerely hope that these difficulties can be overcome. However, unless these serious practical problems are solved, we are concerned that the resulting competitive disadvantage will give rise to allegations of violations of national treatment and treaty obligations. We are committed to work with Congress, the Administration and the rest of the industry to fashion a workable funding system with or without retrospective elements. Our detailed technical comments will be submitted on or before August 1st.

In closing, we wish to re-emphasize that any retrospective element -- including the surrogate foreign-only fee -- must, by the terms of the statute, be given a definite duration and must end without any possibility of re-opening. Without this certainty and predictability the EIRF would fail to achieve one of its stated goals of removing the uncertain cloud over insurers' balance sheets.

Thank you for the opportunity to testify. We look forward to working with the Committee on a fair and practical EIRF funding plan.

GENERAL LIABILITY PROGRAM FOR U.S. MINING COMPANY

PREMIUM	PER OCCURRENCE AND AGGREGATE LIMITS (UNLESS NOTED)	FOREIGN-ONLY FEE
$175,000	$75 million (ex $26 mill)	$375,000
$125,000	$10 million (ex $16 mill)	$50,000
$220,000	$15 million (ex $1 mill)	$75,000
$205,000	$1 million*	$14,250
	100,000 S/I/R	

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* First insured layer ($1 million/occ.) has an annual aggregate of $3 million. Also on the first loss within this layer there is an additional $150,000 "Otherwise Recoverable" Deductible. Therefore, arguably under the Treasury proposal, the maximum limit would be $2.85 million. On all other layers, per occurrence and aggregate limit are the same.

Acting Chairman GIBBONS. All right.
Mr. Harrison.

STATEMENT OF ROBERT L. HARRISON, PAST CHAIRMAN NATIONAL ASSOCIATION OF MUTUAL INSURANCE COS., AND PRESIDENT, INDIANA LUMBERMEN'S MUTUAL INSURANCE CO., INDIANAPOLIS, IND.;

Mr. HARRISON. Yes, sir. Mr. Chairman and members of the committee, I have a prepared statement that I am going to read. I guess after listening to the last panel, though, it is a little bit embarrassing as a member of the insurance industry that we can't seem to come together to reach some kind of a common goal on how we are going to approach the subject, so I guess I will leave that for questions later and I will go forward with my statement.

First of all, thank you for inviting me to testify today on the financing provisions of the Environmental Insurance Resolution Fund of the Superfund Reform Act of 1994. I am here today on behalf of the National Association of Mutual Insurance Companies, better known as NAMIC.

NAMIC is the largest property and casualty company trade association in the world with over 1,240 member companies, who write nearly 30 percent of the property/casualty premiums in the United States. My company, Indiana Lumbermens Mutual Insurance Co., is a medium-sized company that writes commercial business in 25 States.

The membership of NAMIC strongly believes that the Superfund program is in need of fundamental reform. We have spent too many dollars on litigation and too few dollars on cleanup of polluted sites. NAMIC believes that the only way to truly reform Superfund is to eliminate retroactive, strict joint and several liability and to establish a broad-based fund to pay for cleanup directly.

Insurers would be willing to contribute to this fund in return for retroactive liability relief. NAMIC, along with the majority of the property/casualty industry, is disappointed that H.R. 3800 does not take this approach. NAMIC is extremely concerned with a proposal that generates over $8 billion in new taxes and provides no assurance that the funds will be used for cleanup.

NAMIC believes the single most important guiding principle for Superfund reform should be that tax dollars collected apply to clean up. Unfortunately, the current proposal does not meet this objective. In theory in return for paying this new EIRF tax some insurers will have reduced Superfund litigation costs, but no assurances that the tax dollars will be used for cleanup.

My company, Indiana Lumbermens as well as many others, will receive nothing in return for this tax. We have yet to spend a single dollar in Superfund litigation. For 1993, Indiana Lumbermens will pay approximately $10,000 for the EIT. In the first year of EIRF, we will pay $188,000, in addition to the EIT, a 2,000 percent increase in taxes. By year five we will pay $297,000 annually. This is before the tax rate increases dramatically in years 6 to 10.

This fact illustrates the inequity of the tax provisions and emphasizes the need to rethink the administration reform proposal. As insurance companies such as Indiana Lumbermens are burdened with this new Superfund tax and other taxes, we will be

forced to pass these costs along to policyholders who will receive no direct benefit from these increased costs.

Recognizing that Congress may support the EIRF concept, we urge the adoption of a 100 percent retrospective tax. Our reasoning is the fact that the administration's intent was to recognize in reduction of past liabilities for companies who wrote commercial lines from 1971 to 1985.

Records show that the proponents of 100 percent prospective financing for the EIRF have reduced their commercial writing since the mid 1980s. Many NAMIC member companies and others helped fill the void created during the 1985–86 availability and affordability crisis by picking up these writings over the past several years. Requiring companies who write commercial business today, but have no pre-1986 Superfund liability to pay the EIRF tax, is nothing less than a bailout of those companies to who do have the liability.

Enacting a 100 percent retrospective tax will be the first step in ensuring that those who benefit will be the ones who pay.

NAMIC is extremely concerned with the language in the prospective tax section of the financing proposal that incorporates personal lines of business. As currently written, this new tax applies to all fire insurance premiums, not just those on commercial lines.

The majority of the NAMIC companies write only personal lines coverage and many are not authorized to write liability coverage at all. This is yet another instance in which the reach of EIRF tax extends far beyond those it was intended to benefit.

In closing, NAMIC is offering these suggestions for making the EIRF financing more equitable. I would like to reiterate that we only offer these suggestions as a last resort. Our membership opposes the EIRF in concept and strongly believes that the best way to truly reform Superfund would be to eliminate retroactive liability and create a broad-based fund to pay for cleanup directly. We would be willing to contribute our fair share toward this effort.

Again, thank you for giving us this opportunity to testify today. NAMIC looks forward to working with the Ways and Means Committee to find ways to establish an efficient and equitable funding mechanism for the Superfund program. Thank you.

[The prepared statement follows:]

STATEMENT OF
ROBERT L. HARRISON
PRESIDENT
INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY
BEFORE THE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

JULY 25, 1994

Introduction

Mr. Chairman and Members of the Committee,

Thank you for inviting me to testify today on the financing provisions of the Environmental Insurance Resolution Fund of the Superfund Reform Act of 1994. I am here this morning on behalf of the National Association of Mutual Insurance Companies (NAMIC). NAMIC is the largest property and casualty company trade association in the world with over 1240 member companies. The NAMIC membership comprises nearly 30 percent of property and casualty insurance premiums in the United States. Our membership includes all types of property and casualty insurance companies, including mutuals, stocks, reciprocals, reinsurers and surplus lines carriers. We have a diverse membership with companies ranging in size from small mutuals that only write in one county to very large companies such as the American International Group, Nationwide, and State Farm. My company, Indiana Lumbermens Mutual Insurance Company, is a medium-sized property casualty insurance company that writes mostly commercial business in five states. Today I would like to focus on how the proposed Environmental Insurance Resolution Fund taxes would affect the small and medium sized companies of NAMIC.

Background

The membership of NAMIC strongly believes that the Superfund program is in need of fundamental reform. Since the enactment of the Superfund program in 1980, far too few sites have been cleaned up and far too many resources have been spent on litigation and other transaction costs. The NAMIC membership strongly believes that the most effective and equitable way to expedite site clean up and to reduce transaction costs would be to eliminate the current system of retroactive, strict, joint and several liability and to replace it with a broad based fund that would pay for clean up directly.

NAMIC is concerned that H.R. 3800, the Superfund Reform Act of 1994, will neither effectively reduce transaction costs nor expedite site clean up. We are particularly concerned about the Environmental Insurance Resolution Fund, or EIRF contained in Title VIII of the bill. The EIRF would raise at least $8.1 billion from the property and casualty insurance industry over ten years in an attempt to reduce litigation between potentially responsible parties (PRPs) and their insurers over Superfund coverage disputes.

The EIRF unfairly singles out the insurance industry -- which did not contribute to the pollution of hazardous waste sites -- to provide all of the new funding for Superfund. This money would only be used to address a small part of the problem, to resolve disputes between PRPs and insurers. There is no guarantee that the money from the EIRF would be used to clean up sites. If PRPs would even choose to settle with the EIRF, they could use the money to pay for past legal costs or to subsidize their litigation against the government.

We are also concerned about the uncertainty of the EIRF. If, after collecting taxes from insurers for two years and creating an EIRF bureaucracy to verify hundreds of thousands of insurance records, only 84 percent or fewer of the PRPs chose to settle, the EIRF would be abolished and the money refunded to insurers. This effort would be a tremendous waste of time and resources that would do absolutely nothing to expedite clean up. I am also skeptical that the insurers would ever see this money again.

I am confident in saying that 75 percent of the property and casualty insurance industry shares these views about the EIRF. NAMIC, the Alliance of American Insurers, the National Association of Independent Insurers, and the Council of Insurance Agents and Brokers all oppose the EIRF and believe that the way to truly reform Superfund is to eliminate the system of retroactive, strict, joint and several liability and replace it with a broad based fund to pay for clean up directly. Insurers would be willing to contribute to this fund in return for retroactive liability relief.

Financing of the EIRF

The bill before the Committee does contain an EIRF, and it will be your job to decide exactly how this EIRF will be financed. I would like to discuss how the current Treasury Department proposal would affect the companies of NAMIC as well as suggestions we have for improvements.

The financing proposal that has been released to date would provide $3.1 billion to finance the first five years of the EIRF. At least an additional $5 billion will be required to finance the second five years. The money will be raised through a 70 percent retrospective tax on commercial policies written between 1971 and 1985 and a 30 percent prospective tax on current policies.

NAMIC believes that the single most important guiding principle for the EIRF should be that those who benefit from it should be those who contribute to it. Unfortunately, the current proposal does not meet this objective. In theory, in return for paying this new tax, insurers will have reduced Superfund litigation costs. My company, Indiana Lumbermens, as well as many others, will receive nothing in return for this tax. Under the current proposal, my company will be required to pay hundreds of thousands of dollars in new taxes every year even though we did not insure risks that would expose us to Superfund liability. We have yet to spend a single dollar on Superfund litigation.

The original intent of the Environmental Insurance Resolution Fund and the tax on insurers was to offset the reduction in insurers' liability. However, when one carefully examines who will pay the tax, one can clearly see that the total number of companies who are required to pay the tax is far greater than the number of companies who will pay the tax and actually receive a benefit from it. My company and hundreds of others will only have the new tax with no offset in a reduction of liability.

In addition, this tax burden will substantially increase in the second five years of the program, which will have a negative impact on my company's bottom line as well as on my company's policyholders. As insurance companies such as Indiana Lumbermens are burdened with this new Superfund tax and other taxes, we will be forced to pass these costs along to policyholders, who, like many companies, will receive no benefit from these increased expenses.

Although they will not solve all of the problems with the EIRF, NAMIC believes that the Ways and Means Committee should make two significant changes to the current Treasury proposal. First, the tax should be 100 percent retrospective. Second, the tax should only apply to commercial lines of business.

The goal of the EIRF is to reduce the number of disputes between PRPs and insurers over whether or not policies such as commercial general liability covered the clean-up of pre-1986 hazardous waste. Theoretically, this EIRF would provide more certainty for the insurers involved in these disputes. Because these disputes involve only pre-1986 sites, it is logical that the tax should apply to only those insurance policies written before 1986. A prospective tax would have no connection to the coverage disputes that are underway and would place an unfair burden on thousands of companies that have never been involved in Superfund cases nor written liability coverage.

Records demonstrate that the proponents of 100 percent prospective financing for the EIRF have reduced their commercial writings since the mid-1980's. Many NAMIC member companies and others helped fill the void of the 1985-86 availability/affordability crisis by picking up these commercial writings over the past several years. By the time these companies picked up these coverages, the industry had become aware of Superfund, and companies had begun either excluding pollution coverage or specifically writing environmental liability coverage and charging appropriate premiums. Requiring companies who write commercial business today, but have no pre-1986 Superfund liability, to pay taxes to the EIRF is nothing less than a bail-out of those companies who do have the liability. Enacting a 100 percent retrospective tax would be the first step in ensuring that those who benefit are the ones who pay.

NAMIC is concerned with the language in the prospective tax section of the financing proposal that addresses fire lines of business. As currently written, this tax applies to all fire premiums, not just those on commercial lines. The tax will apply to all personal fire line premiums. Many small NAMIC companies write only fire coverage and no liability coverage at all. These companies never had anything to do with Superfund, yet they would be required to pay this tax. This is yet another instance in which the reach of EIRF tax extends far beyond those it was intended to benefit.

The Ways and Means Committee could easily address the fire lines problem by eliminating the prospective tax section and making the tax 100 percent retrospective. If the Committee chooses to retain the 70 percent retrospective, 30 percent prospective structure, we would suggest that the tax be applied to the same lines of business in the prospective section of the proposal as in the retrospective section.

In addition, if a prospective tax is maintained, we suggest that insurers be allowed to include the Superfund tax as a separate line item on policyholders' statements. This would allow our policyholders to see why they are being required to pay a substantial tax and receiving nothing in return.

Additional Concerns

NAMIC is also concerned about changes that were incorporated into the Senate version of the Superfund Reform Act that could substantially increase costs for the EIRF and subsequently increase the tax burden on insurers. One of these changes included selecting state percentages based on 2/3 venue of current litigation and 1/3 location of Superfund sites rather than the original 1/2 venue, 1/2 site location formula. Because PRPs tend to select venue for their litigation based on favorable state law, giving more weight to venue would place more settlements in the 60 percent category, so more money would be needed from the EIRF.
The other substantial change is that interest on past costs will now be paid from the date of acceptance of the EIRF offer. Before this change, interest was not to be paid for five years.

We encourage the Committee to obtain a reading on how much these changes would cost the EIRF and how much additional revenue would actually be required before taking action on the bill.

In Closing

While NAMIC is offering these suggestions for making the EIRF financing more equitable, I would like to reiterate that we only offer these suggestions as a last resort. Our membership opposes the EIRF in concept and strongly believes that the best way to truly reform Superfund would be to eliminate retroactive liability and create a broad based fund to pay for clean up directly. We would be willing to contribute our fair share toward this effort.

Again, thank you for giving me the opportunity to testify today. NAMIC looks forward to working with the Ways and Means Committee to find ways to establish an efficient and equitable funding mechanism for the Superfund program.

Acting Chairman GIBBONS. Mr. Steinberg.

STATEMENT OF HOWARD E. STEINBERG, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, RELIANCE GROUP HOLDING, INC., ON BEHALF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Mr. STEINBERG. Mr. Chairman and members of the committee, my name is Howard E. Steinberg. I am senior vice president and general counsel of Reliance Group Holdings, parent company of Reliance Insurance Co. Reliance Insurance has been doing business since 1817. We are headquartered in Philadelphia and we operate in all 50 States and the District of Columbia.

I am appearing here today on behalf of our insurance trade association, the National Association of Independent Insurers. On behalf of NAII's 575 member companies, I would like to thank the committee for this opportunity to express our views which are fully set forth in written testimony submitted to you last week.

It is NAII's position that H.R. 3800's mechanism for financing the resolution of environmental cleanup disputes by creating an Environmental Insurance Resolution Fund is seriously flawed and grossly unfair. It should not be adopted as proposed. Indeed, the NAII believes that the overwhelming majority of insurance companies in this country would favor Superfund legislation which dealt head on with the costs of environmental cleanup by imposing a broad-based business tax such as the corporate environmental tax already contained in Section 59 A of the Internal Revenue Code.

This broad-based business tax should be coupled with repeal of strict retroactive joint and several liability on the part of potentially responsible parties. We urge Congress to undertake this substantive comprehensive Superfund reform rather than rush through a flawed plan this year.

The fundamental unfairness of the environmental insurance fund created by H.R. 3800 is that it imposes a premium tax on insurance companies that have little or no liability for environmental cleanup costs. They are taxed solely because they are insurers, with no attention to whether or not they are relevant insurers.

My company is an excellent example of how unfair the proposed premium tax would be. During the 15 years from 1971 through 1985, the period upon which 70 percent of the tax is based, Reliance wrote very little business for which it would have any environmental exposure. To illustrate, out of nearly $3 billion in loss reserves, we estimate that on a worst case basis, on a worst case basis only 1 percent or $30 million is attributable to Superfund claims.

Nevertheless, we estimate the proposed premium tax could cost us as much as $170 million over the next 10 years, a $170 million tax on us with virtually no benefit or relevance to us. There are, in fact, many NAII member companies with no exposure at all that will be required to pay large premium taxes into the fund.

In summary, Mr. Chairman, it is our position that the Environmental Insurance Resolution Fund should not be funded by the vast majority of insurers that have little or no environmental liabilities and are, in effect, innocent bystanders.

If Congress nevertheless believes that all property and casualty insurers should participate in the funding, we would ask the committee to consider a fairer and less complicated way to achieve funding goals.

We propose a commercial insurer tax and a claims settlement tax, both of which use existing corporate tax structure. We further propose that the tax not go into effect until the 85 percent minimum participation level is determined. The commercial insurer tax will be imposed upon all insurers for certain specified commercial lines of business. The specified lines would only be ones that theoretically could give rise to environmental cleanup coverage claims.

Using the administration's estimated funding requirements over a 10-year period, we have developed a tax rate which would be applied to each insurer's alternative minimum taxable income to determine the amount of commercial insurer tax owed.

The claims settlement tax, on the other hand, would be imposed only upon insurers which have cleanup exposure. We call them the exposed P and C insurers. The extent of this tax and the identity of each insurer is based upon Superfund claims made against these insurers by PRPs. The filing of this information by exposed P&C insurers as required under H.R. 3800 would provide an estimate of the potential amount of claims to be resolved by the funds. The amount of the tax on each exposed P&C insurer can then be readily determined. Collection would occur over the same 10-year period.

Thus under these two taxes, 30 percent of the funds needed would be collected from insurers writing lines of business having the potential, the potential of environmental claims, whether they have any claims or not. The remaining 70 percent will come from insurers that actually have claims filed against them.

In conclusion, NAII believes it is unfair to require insurers with little or no liability to participate in the funding of hazardous site cleanups. If Congress, however, decides that these insurers should participate, our proposal will accomplish the objectives of the Environmental Insurance Resolution Fund—adequate funding of dispute resolutions without the necessity of costly litigation, in a fair manner and without the creation of a new tax structure. Thank you for your consideration.

[The prepared statement and attachments follow:]

STATEMENT OF

HOWARD E. STEINBERG

ON BEHALF OF THE

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

ON H.R. 3800

BEFORE THE

COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

JULY 25, 1994

Mr. Chairman, members of the Committee, the concept of using a new federal tax on insurance premiums to finance the proposed Environmental Insurance Resolution Fund ("EIRF") would unfairly impose a substantial tax burden on property and casualty ("P&C") insurers who, because they have little or no Superfund liability exposure, will derive little benefit from the proposed EIRF. Fairer and more workable alternatives exist for financing the EIRF.

On behalf of NAII, I will propose one such alternative this morning. This alternative would replace the inequitable premium tax approach with two additional corporate environmental taxes, applicable only to certain property and casualty insurers. These taxes would be added on top of the existing CET under Section 59A of the Internal Revenue Code of 1986. This alternative would have very significant advantages over the current premium tax proposal. First, it avoids a regressive federal "sales" tax on insurance products; second, it builds upon an existing tax structure, avoiding the necessity of developing a new, complex tax scheme; and third, it more accurately and fairly allocates the tax burden on those who benefit from the EIRF.

Good afternoon. My name is Howard E. Steinberg, Senior Vice President and General Counsel of Reliance Group Holdings, Inc., the parent company of Reliance Insurance Company. Reliance Insurance Company has conducted business since 1817, making it one of the oldest property and casualty insurance companies in the United States. Reliance Insurance is headquartered in Philadelphia and operates in all 50 states and the District of Columbia. It writes primarily standard commercial business through over 3,000 independent agents as well as regional and national brokers. Reliance Insurance is ranked by A.M. Best as the 19th largest insurance company based on direct premiums written.

I am appearing here today on behalf of the National Association of Independent Insurers, an organization consisting of 575 independent insurance companies of which Reliance Insurance is a member.

In our view, the EIRF is fatally flawed because of its failure to address the root cause of the program's abysmal cleanup record. In order for the Superfund program to work as envisioned, comprehensive reform, including the repeal of the current strict retroactive joint and several liability regime, is needed. We urge Congress to undertake substantive comprehensive reform of the program's retroactive liability scheme rather than rush a flawed plan through Congress this year.

In particular, Title VIII (the EIRF provisions) and the portions of Title IX dealing with the EIRF and its financing are a poor substitute for true reform. We strongly oppose their inclusion in this legislation and urge that they be stricken from the bill. If the Congress, nonetheless, decides to proceed with the bill, we strongly believe that Titles VIII and IX must be substantially amended because they are severely flawed and unworkable as currently written.

With respect to Title IX (with which this Committee is directly concerned), NAII specifically opposes efforts to shift the burden for settling private insurance claims for coverage of environmental cleanup costs from the companies that wrote such business onto other insurers that are not exposed to direct and actual liability for such claims. The proposed EIRF is in essence nothing more than a statutory mechanism for settling these claims. Considerations of equity consequently require that any financing mechanism proposed for the purposes of funding the EIRF should place the EIRF's costs upon those companies that will benefit from its operation. The current proposal for financing the EIRF, however, would impose a substantial portion of these costs upon precisely those insurers with little or no direct exposure to environmental cleanup claims. Such an allocation is patently unfair, and inherently in conflict with the nature of the EIRF. We therefore urge Congress to seriously consider the appropriateness of placing any of the financing burden -- in whatever fashion imposed -- upon insurers other than those commercial P&C insurers whose claims are actually being resolved by the EIRF.

If Congress nevertheless decides to unfairly apportion some part of the burden for claims settlement to insurers without direct liability, the financing approach that I will present today represents a more equitable and administratively efficient method for doing so than would be the case under the currently proposed system of premium taxes. The proposed premium tax -- a form of federal sales tax -- would unfairly impose the financing burden for the EIRF on many insurers receiving little or no benefit from the settlement of claims under EIRF, would be regressive, would encroach upon state tax regimes and would unnecessarily complicate tax compliance and enforcement. The proposed premium taxes should therefore not be adopted as a mechanism for funding the EIRF.

As presently proposed, prospective and retrospective premium taxes would be assessed with respect to certain property and casualty insurance premiums, as a mechanism to fund the EIRF. These premium taxes would be imposed for a 10-year period, commencing upon the date of enactment of the Superfund Reauthorization Act of 1994 (H.R. 3800). Premiums subject to this tax would generally be those with respect to commercial policies, including commercial multi-peril policies and other liability policies with certain exceptions for non-commercial policies or other policies that provide neither comprehensive general liability coverage nor environmental liability coverage. Under the Administration's proposal, the premium tax base would have both a retrospective and a prospective component, and would not be subject to any cap.

We understand that a total of $8.1 billion dollars will be raised from both the prospective and retrospective components of the proposed premium tax. The annual amounts to be raised by these taxes are as follows (the amounts for years six through ten having been estimated since these amounts have not been publicly released):

	Prospective Premium Tax	Retrospective Premium Tax	Total Premium Tax
Year 1	$150,000,000	$350,000,000	$500,000,000
Year 2	$150,000,000	$350,000,000	$500,000,000
Year 3	$210,000,000	$490,000,000	$700,000,000
Year 4	$210,000,000	$490,000,000	$700,000,000
Year 5	$210,000,000	$490,000,000	$700,000,000
Year 6	$240,000,000	$560,000,000	$800,000,000
Year 7	$270,000,000	$630,000,000	$900,000,000
Year 8	$300,000,000	$700,000,000	$1,000,000,000
Year 9	$330,000,000	$770,000,000	$1,100,000,000
Year 10	$360,000,000	$840,000,000	$1,200,000,000

The retrospective tax would be assessed with respect to premiums that a P&C company had collected on covered commercial policies issued during the years 1971 through 1985, with the premium amounts adjusted for inflation and with a $50 million exemption level. The retrospective tax would raise $2.1 billion over the 5-year period following enactment, and we estimate $3.39 billion over the following 5-year period.

The prospective tax would be applied with respect to premiums for covered commercial policies written after enactment. The prospective tax is designed to raise approximately $1 billion over the 5-year period following enactment, and we estimate $1.61 billion over the following 5-year period.

Although the EIRF, and the proposed premium tax financing mechanism, have been characterized by some as a compromise for resolving pending litigation, the compromise negotiations have not involved representatives of all affected parties. The Administration apparently developed the proposal after consultations with some PRPs, several environmental groups, and the American Insurance Association ("AIA"). The AIA represents a segment of the insurance industry which accounts for approximately 22.9 percent of net written premiums, but it does not represent -- nor can it purport to speak on behalf of -- the vast majority of P&C insurers.

The result of this so-called "compromise" is a proposal that would introduce an unwise and unfair tax regime for the vast majority of insurance companies. The structure of the proposed premium tax reached through this compromise is one that is ill-designed to collect amounts from those P&C insurers who would benefit from resolution of claims regarding environmental insurance coverage. The prospective tax component will be assessed on premiums written by insurance companies that may not be exposed to significant liability claims under Superfund. In fact, many of the companies that would be subject to the tax had little or no commercial liability business of any kind during the years covered by the disputed claims. Nevertheless, all insurance companies would be assessed a premium tax to settle claims involving only a portion of the industry.

In the case of the retrospective tax component, a tax assessed with respect to commercial liability policies written during the years 1971 through 1985, the tax fails to draw a distinctions between insurance companies having substantial exposure to environmental claims under policies written during that period and companies having relatively little exposure to such claims. The retrospective component of the premium tax is a very blunt instrument that, comparing potential litigation costs with potential tax liabilities, would produce some clear "winners" and many clear "losers" in the trade-off.

Reliance Insurance is an excellent example of the inequities that would be wrought by the proposed premium tax. As currently proposed, 70 percent of the tax would be based upon commercial premiums written during the 15 years from 1971 through 1985. During this period of time, Reliance Insurance wrote commercial insurance policies principally for small and medium sized businesses. We liked to think of our typical customer as a hardware store in Middle America. Consequently, Reliance Insurance has very little exposure for environmental coverages during that period. Out of total loss reserves of nearly $3 billion, we estimate that, on a worst case basis, only approximately $30 million or 1 percent, are attributable to Superfund claims. Our estimates of future legal expenses for declaratory judgment actions involving Superfund sites is under $3 million dollars. Nevertheless, we estimate that the proposed premium tax could cost us as much as $170 million over the next 10 years. That would be $170 million of additional tax with virtually no benefit to us. It is, of course, an understatement to say that we regard this as grossly unfair.

Moreover, even among P&C Insurers with actual claims exposure the currently proposed premium tax provision may prove grossly inequitable and result in significant economic distortions. Since not all persons with claims against insurers for environmental clean-up costs must accept participation for the EIRF to go into effect, it is possible that on an individual P&C insurer, who has direct exposure, may have a significant tax burden imposed upon it, and yet receive no benefit thereby if its particular insureds choose not to accept settlements.

In addition to being highly inequitable, the proposed premium tax also has other serious flaws in terms of federalism concerns, regressivity, and complexity.

First, a federal premium tax would encroach upon a tax base that has been reserved to the states. In 1991, for example, the various states collected approximately $7.7 billion in premium taxes, generally in lieu of state and local income taxes on

insurance companies. As in the case of proposals for general national sales taxes, the federal premium tax proposal places the federal government in competition with states for a common tax base.

Potential conflicts among states have been addressed through retaliatory tax provisions in the various states. Under these provisions, a state seeking to impose a high rate of premium tax on insurers doing business in that state, but domiciled in another state, faces the prospect of triggering a retaliatory increase in premium tax by the domiciliary state with respect to insurers domiciled in the first state and doing business in the second state. Because of these retaliatory provisions, there is some constraint on increasing premium tax rates at the state level. However, a premium tax on the federal level, once instituted, would not be subject to this inter-jurisdictional tax constraint. As in the case of proposals for general national sales taxes, the federal premium tax proposal creates the potential for crowding out the states.

Second, like other sales taxes, the proposed premium tax would be regressive. It is not based on ability to pay. Because the tax would essentially be imposed on gross income, rather than net income, a P&C insurer would have substantial federal premium tax liability even if it had an economic loss, and negative taxable income, for the taxable year. The tax therefore imposes a regressive burden on those who bear it economically, since the tax is largely unrelated to anyone's ability to pay it.

Finally, the proposal would create an entirely new tax, with new compliance burdens on insurance companies and new enforcement burdens on the Internal Revenue Service. Although the concept of a premium tax may seem simple, implementation would involve numerous complications, as evidenced by the 30 pages of bill language devoted to a recitation of the statutory rules for determining tax liability. The proposal would introduce such newly defined terms as: applicable funding rate, applicable target revenue amounts, assessable person, adjusted base-period commercial premiums, inflation-adjusted commercial premiums, inflation adjustment factor, exemption amount (with aggregation rules), commercial net premiums, qualified commercial policies, allocated reinsurance, unallocated reinsurance, commercial reinsurance share, taxable period, base period, base-period year, direct premiums written, net premiums written, annual statement, policy, foreign person, policy of casualty insurance, related person, and maximum limit of liability.

Perhaps the complexities resulting from the creation of this new taxing structure could be tolerated if the proposal represented sound substantive tax policy. But, in this case, the complications serve instead to compound the problems associated with the substance of the proposal.

The aforementioned policy problems inherent in a federal premium tax, i.e., inequity, federalism, regressivity and complexity, cannot, moreover, simply be swept under the rug on the grounds that the proposal calls for taxes at a relatively low percentage rate (ranging from 0.20% to 0.27% of premiums with respect to the retrospective tax and from 0.34% to 0.44% of premiums for the prospective tax based solely upon the rates that have been publicly released for the first five years of the EIRF). These percentages can be deceptive. Bear in mind that the tax is imposed on gross revenues (i.e., premiums), rather than net income. As a result, a premium tax at a given rate is comparable to a net income tax imposed at a rate many times higher than the premium tax rate.

Consider, for example, that the gross premiums written in 1992 for all P&C insurance lines totalled about $230 billion while the net income (determined for regulatory purposes) was approximately $10 billion. Using this 23:1 ratio, the 0.44% prospective premium tax applicable for 1997-1999 is roughly comparable to a 10% tax on net income related to the policies in question. And the premium tax would be in addition to the regular federal income tax paid by P&C insurers. Viewed in this light, the proposed premium tax -- even if only the prospective portion is taken into account -- is of major significance.

The NAII, therefore, urges that the premium tax provisions be replaced with a simple and easily administrable structure of Corporate Environmental Tax ("CET") taxes (applicable only to certain commercial P&C insurers) that can be added onto the

existing CET provisions contained in Section 59A of the Internal Revenue Code without requiring the creation of a new and separate tax system. See Appendix A attached to this statement for a detailed description of the mechanics of this proposed CET tax structure. This CET tax structure would be less complicated, less administratively costly, and would more equitably allocate the burden of the EIRF to those P&C companies, who currently face exposure to claims for the coverage of environmental clean-up costs ("Exposed P&C Insurers") than would the proposed premium taxes. As under present law, both of these taxes would apply regardless of whether a company is paying alternative minimum tax or regular income tax.

The first component of this structure would be a Commercial Insurer Tax upon those P&C insurers currently writing business in those commercial property and casualty insurance lines that are of the same general type as those contracts that gave rise to environmental clean-up costs claims. The amount of the tax would be equal to the amount of Alternative Minimum Taxable Income used in computing the insurer's general Corporate Environmental Tax multiplied by a rate, which would vary in proportion to the percentage of such business written by each individual insurer. The Commercial Insurer Tax is designed to generate the same amount of revenue as would be raised under the prospective component of the premium tax (approximately 30 percent of the total), but to do so in a manner that is more equitable and less administratively costly than would be the prospective premium tax.

The second component of this structure would be a Claims Settlement Tax imposed upon only those P&C insurers with actual environmental cleanup cost claims that are being resolved by the EIRF. A total tax amount would be set for each year of the EIRF's operation, and then each P&C insurer having claims resolved by the EIRF would pay a tax equal to their proportional share of this amount (based upon the value of claims being settled). This tax is designed to raise the same amounts as would be raised by the retrospective premium tax (approximately 70 percent of the total), but through a mechanism that would closely tie the amount of tax liability to the proportion of benefit actually being received.

Commercial Insurer Tax

Only a small segment of the P&C industry has any significant direct exposure to claims by insureds for environmental clean-up costs (i.e., generally only certain P&C companies that wrote a significant volume of certain types of commercial insurance for businesses in industries that have subsequently been held to have substantial liability for environmental cleanup costs under CERCLA). It is therefore appropriate for these insurers to bear the vast majority, if not all, of the costs of resolving these claims.

It has been argued by Exposed P&C Insurers, however, that the magnitude of these claims is such that there is the possibility that some of the Exposed P&C Insurers might become insolvent should they be forced to shoulder the entire amount of their liability, and that consequently other P&C companies, currently writing certain types of commercial property and casualty insurance, therefore ultimately would be forced to bear a portion of these costs as a result of the operation of state insurance guaranty funds. Therefore, Exposed P&C Insurers have argued that it is appropriate for this larger group of P&C companies also to help finance the resolution of claims against the Exposed P&C Insurers to the extent that they benefit by avoiding possible guaranty fund assessments and by preserving public confidence in the industry.

While this indirect benefit argument has been apparently incorporated into the prospective component of the proposed premium tax (which places approximately 30 percent of the burden for financing the EIRF upon those P&C insurers that do not necessarily have direct exposure), there is no hard evidence to establish that significant insolvencies are in fact likely to occur. It is therefore not at all clear that insurers without direct exposure benefit, in even an indirect fashion, from the operation of the EIRF, or that the amount of any such potential guaranty fund assessments avoided is not far exceeded by the amount of the proposed premium taxes. However, for purposes of this proposal, the allocation of the burden for financing the EIRF has been taken as a given, although the National Association of Independent Insurers believes that the respective amounts to be raised from the Commercial Insurer Tax and the Claims

Settlement Tax will need to be adjusted to achieve a more equitable division of this burden between those P&C insurers with and without exposure.

The Commercial Insurer Tax will be imposed upon those P&C Insurers which write designated commercial lines of business, i.e., general commercial and commercial multi-peril, that either represent more than a de minimis percent of their total business, or represent more than $2 million of annual net premiums. For these purposes, designated commercial insurance would specifically exclude any types of insurance, even if commercial in nature, that would not have given rise to environmental cleanup coverage claims, such as dwelling fire insurance.

For these purposes, each P&C Insurer writing designated commercial insurance will annually compute the percentage of its net premiums from designated commercial insurance to its total net premiums from all business (the "Designated Commercial Insurance Percentage"). This percentage will be determined from the most recent Annual Statement of each P&C insurer filed before January 1, 1995 for the first year in which the Commercial Insurer Tax is in effect, and shall be determined from succeeding Annual Statements for those years in which the tax remains in effect.

P&C Insurers subject to the Commercial Insurer Tax will be grouped into one of ten rate brackets, based upon their Designated Commercial Insurance Percentage. These rate brackets will be established in ten percent intervals, so that the top Commercial Insurer Tax rate will be paid by those P&C insurers in the greater than 90% bracket. Rates will be scaled so that the rate for each bracket is ten percent below that of the next highest bracket, so that for example the rate for those insurers in the greater than 80% to 90% bracket would be 90 percent of the rate in the top bracket and the rate in the lowest bracket, i.e., the greater than 0% to 10% bracket, would be 10 percent of the rate in the top bracket.

The top Commercial Insurer Tax rate will be as follows for each year in the 10-year period beginning on the date on which the EIRF becomes effective (as determined pursuant to the provisions of Title VIII):

Year 1	5.727 %
Year 2	5.298 %
Year 3	6.734 %
Year 4	6.495 %
Year 5	6.112 %
Year 6	6.717 %
Year 7	7.265 %
Year 8	7.761 %
Year 9	8.209 %
Year 10	8.610 %

These rates, however, are only preliminary estimates of the rates that we expect would be imposed, and are subject to revision and refinement.

Each P&C insurer, subject to the Commercial Insurer Tax will multiply its Commercial Insurer Tax rate, as determined above, by its alternative minimum taxable income ("AMTI") over $2,000,000, to determine the amount of the Commercial Insurer Tax owed.

Claims Settlement Tax

Since the EIRF is in essence a government sponsored program to settle private litigation between the Exposed P&C Insurers and insureds that have claims for environmental cleanup costs, and since, moreover, these companies will benefit from a significant decrease in their transaction costs associated with handling and litigating such claims as the result of EIRF, it is appropriate for them to bear the vast majority, if not all, of the EIRF's costs. Indeed, the retrospective premium tax provisions of the Administration's proposal clearly recognize this, and attempt, although unsuccessfully, to achieve this result.

The Claims Settlement Tax would, however, successfully accomplishes the precise objective that the Administration sought to achieve through the retrospective premium tax. Assuming that the effective date of the tax provisions for funding the EIRF is appropriately deferred until after the EIRF is determined to have become effective, then the EIRF Board will possess a considerable amount of information about the claims being resolved, permitting them to determine the relative amount of benefit that each insurer with claims for environmental clean-up costs will be receiving. The Claims Settlement Tax takes full advantage of this information in order to both specifically target the group of insurers who should pay the tax and fairly allocate the total tax burden within this group.

Mechanically, under this proposal, an additional tax (on top of the basic CET Tax and the Commercial Insurer Tax) would be imposed upon each Exposed P&C Insurer.[1] Once the EIRF has become effective, it will be possible for the EIRF Board to make a specific estimate of the potential amount of claims (adjusted to settlement value under the provisions of Title VIII) against each Exposed P&C Insurer that the EIRF will resolve (the "Individual Company Resolution Amount"), and to make therefrom an estimate of the potential amount of claims (adjusted to settlement value) against all Exposed P&C Insurers to be resolved by the EIRF (the "Total Resolution Amount"). The EIRF Board will divide the Individual Company Resolution Amount by the Total Resolution Amount to compute the Company Resolution Percentage for each Exposed P&C Insurer, and shall transmit this percentage to each Exposed P&C Insurer.

For each year in the 10-year period beginning after the EIRF becomes effective, the amount of each Exposed P&C Insurer's Claims Settlement Tax will be determined by multiplying the targeted annual Claims Settlement Tax amount by their Company Resolution Percentage. The targeted annual Claims Settlement Tax amount would be equal to the amount projected to be raised from the retrospective premium tax for each year in the 10-year period.

Caps on Commercial Insurer and Claims Settlement Taxes

In conjunction with the Commercial Insurer Tax and Claims Settlement Tax, a system of caps and credits should be installed to prevent the amount actually collected from exceeding the amount targeted to be raised. This is appropriate because these taxes are being collected for just a specific purpose, i.e., the EIRF.

Effective Date of Proposed Taxes

Regardless of whether or not Congress adopts this approach in place of the proposed premium taxes, the financing provisions for the EIRF should make it clear that any taxes adopted will not become effective until it has been determined that the EIRF will actually become effective under the effective date provisions of Title VIII. If this is not done, then by imposing these taxes prematurely there is a real possibility that the administrative costs required to set up and comply with these taxes will simply be wasted. While far less than the administrative costs of the proposed premium tax, these amounts either for the government or for taxpayers will hardly be insubstantial. Moreover, any taxes collected to finance EIRF would have to be refunded (and more costs incurred thereby) to taxpayers should EIRF not become effective under the

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[1]The Claims Settlement Tax could be alternatively computed by multiplying the Company Resolution Percentage times a Base Claims Settlement Tax rate computed by the EIRF Board for each year in the 10-year period beginning after the EIRF becomes effective. The resulting rate would be multiplied by each Exposed P&C Insurer's AMTI to generate the amount of the Claims Settlement Tax. This alternative approach to determining the Claims Settlement Tax, however, would be somewhat more difficult for the EIRF Board to compute mathematically, and leaves open the possibility that certain Exposed P&C Insurers with little current AMTI, but large amounts of claims being settled against them, might be end up paying less than their fair share of the costs of the EIRF.

current provisions of Title VIII (as currently drafted the EIRF will not become fully effective unless 85 percent of the potentially eligible persons decide to opt-in). Accordingly, we strongly urge that any tax used to finance the EIRF not become effective until the 85 percent minimum level is actually determined to be met.

While it is desirable for the reasons specified above not to impose any tax prior to the date on which the EIRF becomes effective, it is also equally clear that some form of financing is required to pay the costs that will be incurred in order to make this determination. Therefore, the NAII advocates that a system of filing fees be imposed to cover these costs. For each environmental clean-up claim listed by a P&C insurance company under the effective date provisions of Title VIII, the insurance company and insureds will each be charged a flat fee per claim.

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APPENDIX A

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

PROPOSAL TO AMEND THE FINANCING PROVISIONS FOR THE ENVIRONMENTAL INSURANCE RESOLUTION FUND

I. PROPOSAL TO AMEND THE FINANCING PROVISIONS FOR EIRF

The Administration's Environmental Insurance Resolution Reform Act of 1994, as transmitted to the House Ways and Means Committee on May 20, 1994 (the "EIRRA")[1] should be amended in the following ways:

A. Delete the Proposed Premium Tax Provisions.

Section 2 of the EIRRA should be deleted in its entirety. Imposing a premium tax on certain P&C companies in order to fund the proposed Environmental Insurance Resolution Fund ("EIRF") would be excessively complicated, administratively costly, and fail to equitably allocate the burden of the EIRF to those P&C companies, who currently face exposure to claims for environmental clean-up costs ("Exposed P&C Insurers").

B. P&C Insurer Corporate Environmental Tax Taxes.

The premium tax provisions should be replaced with a simple and easily administrable structure of Corporate Environmental Tax ("CET") surtaxes that can be added onto the existing CET provisions contained in section 59A of the Internal Revenue Code (the "Code") without requiring the creation of a new and separate tax system. As under present law, these taxes would apply regardless of whether a company is paying alternative minimum tax or regular income tax. The following taxes, applicable only to P&C insurers that write certain commercial lines of business as outlined in more detail below, would be simply added to the basic CET tax[2] already imposed upon all corporations.

Commercial Insurer Tax

Purpose of Amendment. Only a small segment of the property and casualty insurance industry has any significant direct exposure to claims by insureds for environmental clean-up costs (i.e., generally only certain P&C companies that wrote a significant volume of certain types of commercial insurance for businesses in industries that have subsequently been held to have substantial liability for environmental cleanup costs under CERCLA). It is therefore appropriate for these insurers to bear the vast majority, if not all, of the costs of resolving these claims.

It has been argued by Exposed P&C Insurers, however, that the magnitude of these claims is such that there is the possibility that some of the Exposed P&C Insurers might become insolvent should they be forced to shoulder the entire amount of their liability, and that consequently other P&C companies, currently writing certain types

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[1]This language will presumably be incorporated into the Superfund Reform Act of 1994 (H.R. 3800) as part of Title IX, and not enacted as a separate bill. However, since specific language for Title IX has not yet been released, all references to financing provisions herein are made to EIRRA sections and language.

[2]We are aware that the Superfund Reform Act of 1994 would increase the base CET rate substantially in order to finance Superfund cleanup operations. The CET surtaxes, however, would in no way interfere with this proposal.

commercial property and casualty insurance, therefore ultimately would be forced to bear a portion of these costs as a result of the operation of state insurance guaranty funds. Therefore, Exposed P&C Insurers have argued that it is appropriate for this larger group of P&C companies also to help finance the resolution of claims against the Exposed P&C Insurers to the extent that they benefit by avoiding possible guaranty fund assessments and by preserving public confidence in the industry.

While this indirect benefit argument has been apparently incorporated into the prospective component of the proposed premium tax (which places approximately 30 percent of the burden for financing the EIRF upon those P&C insurers that do not necessarily have direct exposure), there is no hard evidence to establish that significant insolvencies are in fact likely to occur. It is therefore not at all clear that insurers without direct exposure benefit, in even an indirect fashion, from the operation of the EIRF, or that the amount of any such potential guaranty fund assessments avoided is not far exceeded by the amount of the proposed premium taxes. However, for purposes of this proposal, the allocation of the burden for financing the EIRF has been taken as a given, although the National Association of Independent Insurers believes that the respective amounts to be raised from the Commercial Insurer Tax and the Claims Settlement Tax will need to be adjusted to achieve a more equitable division of this burden between those P&C insurers with and without exposure.[3]

Tax Structure. The Commercial Insurer Tax will be imposed upon those P&C Insurers which write designated commercial lines of business, i.e., general commercial and commercial multi-peril,[4] that either represent more than a de minimis percent of their total business, or represent more than $2 million of annual net premiums.

For these purposes, each P&C Insurer writing designated commercial insurance will annually compute the percentage of its net premiums from designated commercial insurance to its total net premiums from all business (the "Designated Commercial Insurance Percentage"). This percentage will be determined from the most recent Annual Statement of each P&C insurer filed before January 1, 1995 for the first year in which the Commercial Insurer Tax is in effect, and shall be determined from succeeding Annual Statements for those years in which the tax remains in effect.

P&C Insurers subject to the Commercial Insurer Tax will be grouped into one of ten rate brackets, based upon their Designated Commercial Insurance Percentage. These rate brackets will be established in ten percent intervals, so that the top Commercial Insurer Tax rate will be paid by those P&C insurers in the greater than 90% bracket. Rates for each year following the date on which the EIRF becomes effective will be scaled so that the rate for the greater than 80% to 90% bracket is 10 percent less than the rate for the top bracket, the rate for the greater than 70% to 80% bracket is 20 percent less than the rate for the top bracket, and so on down to the greater than 0% and less than 10% bracket, which will be 90 percent less than the top rate.

The top Commercial Insurer Tax rate will be as follows for each year in the 10-year period beginning the date on which the EIRF becomes effective (as determined pursuant to the provisions of Title VIII):[5]

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[3]Such an adjustment could easily be incorporated into this proposal by simply adjusting the relative Commercial Insurer Tax rate and the Claims Settlement Tax rate.

[4]Designated Commercial Insurance would specifically exclude any types of insurance, even if commercial in nature, that would not have given rise to environmental cleanup coverage claims.

[5]These rates have been set to generate the following amounts for each year in this 10-year period:

Year 1	$150,000,000
Year 2	$150,000,000
Year 3	$210,000,000

(continued...)

Year 1	5.727 %
Year 2	5.298 %
Year 3	6.734 %
Year 4	6.495 %
Year 5	6.112 %
Year 6	6.717 %
Year 7	7.265 %
Year 8	7.761 %
Year 9	8.209 %
Year 10	8.610 %

Each P&C insurer, subject to the Commercial Insurer Tax will multiply its Commercial Insurer Tax rate, as determined above, by its alternative minimum taxable income ("AMTI") over $2,000,000, to determine the amount of the Commercial Insurer Tax owed.

Claims Settlement Tax

Purpose of Amendment. Since the EIRF is in essence a government sponsored program to settle private litigation between the Exposed P&C Insurers and insureds that have claims for environmental cleanup costs, and since, moreover, these companies will benefit from a significant decrease in their transaction costs associated with handling and litigating such claims as the result of EIRF, it is appropriate for them to bear the vast majority, if not all, of the EIRF's costs. The currently proposed retrospective premium tax, however, is an overly complicated approach that unfairly passes much of this burden off on P&C companies that wrote commercial business during the 1971 through 1985 period but that have no significant exposure to environmental clean-up claims as the result of the type of business for which they wrote this insurance. A CET surtax designed to raise the vast majority of the amounts required to fund the EIRF and based upon the estimated dollar value of environmental clean-up claims asserted against each Exposed P&C Insurer (adjusted by the appropriate settlement percentages) to be resolved by the EIRF is a far simpler and more equitable approach.[6]

Structure of Tax. Under this proposal, an additional tax (on top of the basic CET Tax and the Commercial Insurer Tax) would be imposed upon each Exposed P&C

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[5](...continued)

Year 4	$210,000,000
Year 5	$210,000,000
Year 6	$240,000,000
Year 7	$270,000,000
Year 8	$300,000,000
Year 9	$330,000,000
Year 10	$360,000,000

They are, however, only preliminary estimates of the top rate for each year, and are subject to change and refinement. In particular, these rates will vary depending upon the definition of Designated Commercial Insurance and assumptions with respect to amount of AMTI over the relevant period. The definition used for these purposes would include all Other Liability lines of business (excluding the Products Liability line of business), only the liability portion of the Commercial Multiple Peril line of business, and 83 percent of the Fire line of business (excluding dwelling fire coverage).

[6]Moreover, even among Exposed P&C Insurers the currently-proposed premium tax provision may prove grossly inequitable and result in significant economic distortions. Since not all persons with claims against insurers for environmental clean-up costs must accept participation for the EIRF, it is possible that on an individual Exposed P&C Insurer may have a significant tax burden imposed upon it, and yet receive no benefit thereby if its particular insureds choose not to settle. The weighting of the Claims Settlement Tax would avoid this situation.

Insurer.[7] Once the EIRF has become effective,[8] it will be possible for the EIRF Board to make a specific estimate of the potential amount of claims (adjusted to settlement value)[9] against each Exposed P&C Insurer that the EIRF will resolve (the "Individual Company Resolution Amount"), and to make therefrom an estimate of the potential amount of claims (adjusted to settlement value) against all Exposed P&C Insurers to be resolved by the EIRF (the "Total Resolution Amount"). The EIRF Board will divide the Individual Company Resolution Amount by the Total Resolution Amount to compute the Company Resolution Percentage for each Exposed P&C Insurer, and shall transmit this percentage to each Exposed P&C Insurer.

For each year in the 10-year period beginning after the EIRF becomes effective, the amount of each Exposed P&C Insurer's Claims Settlement Tax will be determined by multiplying the targeted annual Claims Settlement Tax amount[10] by their Company Resolution Percentage.

Caps on Commercial Insurer and Claims Settlement Taxes

Cap Amounts. Should the total amount of tax collected under the Commercial Insurer Tax exceed $2.43 billion, this tax shall terminate for subsequent years. Should the total amount of tax collected under the Claims Settlement Tax exceed $5.67 billion, this surtax shall terminate for subsequent years. A deficiency in one tax shall not be offset by collections from the other tax.

Base Tax Adjustment to Avoid Exceeding Cap. For each year after the first year in which the EIRF and the CET surtaxes become effective, the EIRF Board shall estimate the amount of taxes to be collected in such year. If, based upon this estimate, it is determined that the amount to be collected for such year for the Commercial

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[7]The Claims Settlement Tax could be alternatively computed by multiplying the Company Resolution Percentage times a Base Claims Settlement Tax rate computed by the EIRF Board for each year in the 10-year period beginning after the EIRF becomes effective. The resulting rate would be multiplied by each Exposed P&C Insurer's AMTI to generate the amount of the Claims Settlement Tax. This alternative approach to determining the Claims Settlement Tax, however, would be somewhat more difficult for the EIRF Board to compute mathematically, and leaves open the possibility that certain Exposed P&C Insurers with little current AMTI, but large amounts of claims being settled against them, might be end up paying less than their fair share of the costs of the EIRF.

[8]This assumes that amendments to correct basic problems in the structure of Title VIII are also adopted. The current structure of Title VIII of H.R. 3800 would not permit such a determination to be made.

[9]For each claim, the estimated total clean-up costs would be multiplied by the relevant applicable settlement percentage as determined under Title VIII of H.R. 3800.

[10]The targeted annual amounts for the Claims Settlement Tax for each year in the 10-year period after the EIRF becomes effective will be:

Year 1	$350,000,000
Year 2	$350,000,000
Year 3	$490,000,000
Year 4	$490,000,000
Year 5	$490,000,000
Year 6	$560,000,000
Year 7	$630,000,000
Year 8	$700,000,000
Year 9	$770,000,000
Year 10	$840,000,000

Insurer Tax will cause the total amount collected thereunder to exceed the cap amount, then the EIRF Board shall make a downward adjustment to the base tax rate (reasonably calculated to prevent such excess amounts from being collected) and shall publish the new rate in the Federal Register.

Credit For Taxes Collected In Excess of Relevant Cap. Should an excess amount actually be collected under the Commercial Insurer Tax, the EIRF Board shall determine the total amount of such excess and the amount attributable to each insurer (equal to the total excess times the insurer's Commercial Insurer Tax rate for the year in which the excess was determined to have occurred). Should an excess amount be collected under the Claims Settlement Tax, the EIRF Board shall similarly determine the total amount of such excess and the amount attributable to each insurer (equal to the total excess times the insurer's Claims Settlement Tax rate for the year in which the excess was determined to have occurred). The excess amounts determined above shall be allowed as a credit against the insurer's base CET taxes in subsequent years, or as a credit to the insurer's next year's income taxes should the CET no longer be imposed in such year.

Report on Tax Shortfalls. For each year after the CET surtaxes become effective the EIRF Board shall determine whether the amount collected from each tax met the target collection amount for such year. The target collection amounts for the Commercial Insurer Tax are as follows:

Year 1	$150,000,000
Year 2	$150,000,000
Year 3	$210,000,000
Year 4	$210,000,000
Year 5	$210,000,000
Year 6	$240,000,000
Year 7	$270,000,000
Year 8	$300,000,000
Year 9	$330,000,000
Year 10	$360,000,000

The target collection amounts for the Claims Settlement Tax are as follows:

Year 1	$350,000,000
Year 2	$350,000,000
Year 3	$490,000,000
Year 4	$490,000,000
Year 5	$490,000,000
Year 6	$560,000,000
Year 7	$630,000,000
Year 8	$700,000,000
Year 9	$770,000,000
Year 10	$840,000,000

The EIRF Board shall also determine whether the total amount collected from each tax together with the estimated future collections will meet the total targeted collection amount. The Board shall report its finding to Congress.

C. Effective Date of Commercial Insurer and Claims Settlement Taxes.

The EIRRA should be amended to make clear that the Commercial Insurer Tax and Claims Settlement Tax (or even the proposed premium taxes) will not become effective until it has been determined that the EIRF will actually become effective under the effective date provisions of Title VIII. If this is not done, then by imposing these taxes prematurely there is a real possibility that the administrative costs required to set up and comply with these taxes will simply be wasted. While far less than the administrative costs of the proposed premium tax, these amounts either for the government or for taxpayers will hardly be insubstantial. Moreover, any taxes collected to finance EIRF would have to be refunded (and more costs incurred thereby) to

taxpayers should EIRF not become effective under the current provisions of Title VIII. Accordingly, the following section should be added to EIRRA:

SEC. 4. EFFECTIVE DATE OF COMMERCIAL INSURER TAX AND CLAIMS SETTLEMENT TAX.

Until such time as the Fund determines, pursuant to Title VIII, that a weighted total percentage of 85 percent or more of all eligible persons have accepted or have been deemed to have accepted participation in the Fund, the Commercial Insurer Tax and Claims Settlement Tax provisions of Title IX shall not become effective.

II. PROPOSAL FOR INITIAL FINANCING DURING PRE-EIRF EFFECTIVE PERIOD THROUGH FEES ON EXPOSED P&C INSURERS AND LISTED INSUREDS.

While it is desirable for the reasons specified above not to impose any tax prior to the date on which the EIRF becomes effective, it is equally clear that some form of financing is required to pay the costs that will be incurred in order to make this determination. Therefore, a system of filing fees should be imposed to cover these costs. For each environmental clean-up claim listed by a P&C insurance company under the effective date provisions of Title VIII, the insurance company will be charged a flat fee of $___ per claim, and the insured will be charged a flat fee of $___ per claim.

Acting Chairman GIBBONS. Thank you.
Ms. Kenworthy.

STATEMENT OF PATRICIA KENWORTHY, DIRECTOR, REGULATORY AFFAIRS, MONSANTO CO.

Ms. KENWORTHY. Thank you, Mr. Chairman. My name is Patricia Kenworthy, and I am here representing Monsanto Co. Monsanto Co. is a Fortune 100 Company engaged in the manufacture of high performance chemicals, agricultural products, pharmaceuticals, and food products. We have been involved in the efforts of the past 2 years which have resulted in the remarkable consensus that supports the many important reforms contained in H.R. 3800.

Our chief executive officer, Dick Mahoney, served on the National Commission on Superfund. We were appointed by EPA to the National Advisory Council for Environmental Policy and Technology, many of whose recommendations are included in the administration's bill. In addition, we participated in the Coalition on Superfund, which produced the compromise that resulted in the Environmental Insurance Resolution Trust Fund we are discussing here today.

I am here to express our strong support for Title VIII of H.R. 3800. This title is a compromise that addresses the needs of both the insurance industry and policyholders. Both sides have made significant concessions to reach this agreement. Title VIII is a critical component of the overall Superfund Reform Act.

Among the issues the Ways and Means Committee is being asked to decide is whether or not the new fees paid by the insurance industry called for by the resolution fund should be entirely prospective. From Monsanto's perspective, the insurance industry represented by AIA has made a fair call on the nature of the multibillion-dollar insurance company fee they are proposing to impose on their industry. They have decided that the fee should be prospective, and we support their decision and ask the committee to amend H.R. 3800 to reflect that decision.

Another point of importance for Monsanto and other policyholders in this title is the need to ensure that the fund has the necessary borrowing authority based on future fund revenues in order to even out its cash flow needs. It is anticipated that the demands on the fund will be greater than its revenue for the first few years, and it is critical to policyholders that we receive fund payouts promptly. The fund's borrowing authority is a critical component of the compromise embodied in title VIII.

In conclusion, we thank the Ways and Means Committee for holding this hearing today and ask that you take prompt action to pass this bill out of your committee. We will be pleased to answer any of your questions.

[The prepared statement follows:]

TESTIMONY OF
PATRICIA KENWORTHY
DIRECTOR, REGULATORY AFFAIRS
MONSANTO COMPANY

BEFORE
THE WAYS AND MEANS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
JULY 25, 1994

Good morning. My name is Patricia Kenworthy and I appreciate the opportunity to testify in support of HR 3800, the Superfund Reform Act of 1994.

Monsanto Company is a Fortune 100 company engaged in the manufacture of high performance chemicals, agricultural chemicals, pharmaceuticals and food products. We have been heavily involved in the efforts of the past several years that have resulted in the remarkable consensus that supports the many important reforms contained in HR 3800. Mr. Mahoney, our CEO, served on National Commission on Superfund, a 26 member group comprised of leaders from the various stakeholder groups that ultimately issued a consensus report. Mike Pierle, our Vice President for Health and the Environment, served on the EPA's National Advisory Council for Environmental Policy and Technology many of whose recommendations are included in the Administration's bill. Finally, we participated in the Coalition on Superfund which produced the compromise that resulted in the Environmental Insurance Resolution Trust Fund.

I am here today to express our strong support for Title VIII of HR 3800, the Environmental Insurance Resolution Fund. This title is a compromise that addresses the needs of both the insurance industry and the policy-holder community. Both sides have had to make significant concessions to reach this point but the insurance industry has reached its primary goal -- certainty; while the policy holder community has reached its primary goal -- prompt payout and resolution of its insurance claims. Title VIII is a critical component of the overall Superfund Reform Act and we are asking that the Committee pass this bill as soon as possible. Other policy-holder companies have indicated that the inclusion of a workable solution to the insurance debate was a deciding factor in their overall support of Superfund reform this year.

Among the issues the Ways and Means Committee is being asked to decide is whether or not the new fee on the insurance industry called for by the EIRF should be entirely prospective. From Monsanto's perspective, the opponents to the prospective fee are engaged primarily in an effort to prevent passage of the Superfund Reform Act this year. As I mentioned earlier, a remarkable coalition of interests have coalesced around HR 3800 as the best way to fix the Superfund program. It has been a lengthy and open process that has examined all credible options and alternatives and has ultimately made some tough calls on issues in order to move forward. As I see it, the insurance industry has made exactly such a call on the nature of the multi-Billion insurance company fee they are proposing to impose on their industry. They have decided that the fee should be prospective in nature and we support their decision and ask the Committee to amend HR 3800 to reflect their decision.

One other point of importance to Monsanto and the policy-holder community in this title is the need to ensure that the EIRF has the necessary borrowing authority from the U.S. Treasury in order to even out its cash flow needs. It is anticipated that the demands on the EIRF will be greater than its revenue for the first few years and it is critical to the policy-holder community that we receive our EIRF payments promptly. At its most fundamental, the business communities support for EIRF is based upon a financial risk analysis that receiving a partial payment today is better than receiving an uncertain number of larger payments in the future. Therefore, the EIRF's borrowing authority is a critical component of the compromise embodied in Title VIII.

In conclusion, I again thank the Ways and Means Committee for holding this hearing today and ask that you take prompt action to pass this bill out of your committee. I will be pleased to answer any questions.

Mr. PICKLE [presiding]. As I understand, that completes the statements of the four participants of this panel; is that correct?

I thought it might be of interest to ask you if we go forward with your solution about getting away from the 70–30 percentage, would it be fair to ask the panel what you think the percentage would be if you had some of both. Let's just say, for example, could it be 50–50, Mrs. Kenworthy?

Ms. KENWORTHY. I have not studied the tax provisions enough to give you a good answer to your question because I don't represent an insurance company. My job here today is as a representative of the policyholders community to indicate that we will support a 100 percent prospective tax.

Mr. PICKLE. All right. Just in general, is it reasonable to think if you have got to have a compromise on it, would 50–50 be somewhere near the territory or do you have a different view of it?

Mr. STEINBERG. Mr. Pickle, if I may, we have proposed what we think is a very viable, very sensible, very fair alternative.

Mr. PICKLE. And what is that?

Mr. STEINBERG. That is to have two taxes in lieu of the 70–30 percent split that has been proposed. The 30–70 percent split is a premium tax. It is a top line tax. It is a regressive tax, and it is very unfair because it falls on a lot of companies that wrote commercial premiums in the years 1971 through 1985, but, in fact, don't have any environmental exposure.

What we are saying is let's have a fair tax, let's put the tax on the people who are going to benefit from this, those insurance companies that have the exposure. Therefore, let's take 30 percent of the tax, let's make it entirely prospective, let's look at what an insurance company's exposure is. We base 30 percent of that tax on what the insurance company is writing today and 70 percent of that tax is based on the benefit that the insurance industry is in fact going to get out of this Environmental Resolution Trust Fund.

The fact of the matter is that this compromise, this so-called compromise arrangement was worked out with a very small segment of the industry. Seventy-five percent of the industry was not present at the table, and a great number of companies in this country do not have that kind of exposure and are being asked to pay the tax.

Mr. PICKLE. So your sense of compromise, then, is to have 100 percent prospective?

Mr. STEINBERG. Not as proposed, sir. Our alternative would make a lot more sense because the tax would be coming from those insurance companies that have the environmental exposure and that are getting the benefit out of the Environmental Resolution Fund.

Mr. PICKLE. All right. Would any others of you have a comment to make?

Mr. HARRISON. I would have a comment, Mr. Pickle. First of all, there is something called the EIT, which is a way of collecting taxes for Superfund, and while it is true that the current EIT is probably not enough to get the job done, I think maybe we should revisit and see if we can't put together a different formula, maybe by increasing the EIT rather than going to any kind of retrospective or prospective tax. If we had a choice, though, if we were asked

which we would favor, we certainly would favor a 100 percent retrospective structure, and our executive committee has let me know very clearly that is not up for compromise as far as we are concerned.

Mr. PICKLE. It is a fairly good split. There is no compromise between you two, then.

Mr. LANDGRAF. Mr. Pickle, to address your first question, which is what is the percent which would be a reasonable compromise, we think ultimately a compromise is possible, but more important than the percentage is the principle that the retrospective slice—whatever percentage it is, and we think there is room to discuss that—must end and it must end in a reasonable period of time both because of the accounting recognition problems which the AIA witness identified, as well as the fact that you simply are denying the insurance industry the certainty which is supposed to be achieved by EIRF if there is an indefinite open-ended retrospective revisitation. We think that is much more important than the percentage.

Mr. PICKLE. You make a good point. Mr. Houghton, do you have any questions?

Mr. HOUGHTON. I am not quite sure whether this is a question, Mr. Chairman. Rather, I would like to discuss an issue for a moment. You know, it seems incredible to me that the insurance industry cannot come to some sort of resolution on this. What you are asking us to do is to make the decision for you, and that is wrong. You should be making the decision. I know people are going to have to give and take and make some adjustments, but really you who know so much about this, you who are involved in this, somehow ought to have a mighty meeting and come up with some sort of a compromise here which would help us make the decision. If not, then we are going to make it for you and inevitably it is going to make people unhappy here. Would any of you like to make a comment on that?

Mr. HARRISON. Sir, I would like to make a comment on that if I could. First of all, the insurance industry had very little, if any, input on the way the present EIRF was put together because it came from the Treasury Department. All we were really asked to do, I believe, is to say whether it should be retroactive, prospective, and if a split, what that split should be. I don't think our input was ever asked until now. However, 75 percent of the industry, which is basically represented here at the table today, without question supports a retrospective structure if we must have a tax of that fashion.

Even the one association who wanted to make a compromise is split in its own ranks, so it is a little difficult. I agree with you, it is embarrassing for the insurance industry. We probably have 80 to 85 percent of the companies in basic agreement and we have the other 15 that are holding out for something different. I would have to think that the 15 percent that are holding out for something different have some ulterior motives in mind and that is why they are coming from a different point than we are. Eighty-five percent of the industry is in agreement on where we should go with this.

Mr. HOUGHTON. Maybe some of the others would like to make a comment on this.

Mr. STEINBERG. Mr. Houghton, I think part of the problem is that a great deal of the industry doesn't really understand why it is being asked to bear this burden. A great deal of the industry feels that it had nothing to do with creating the pollution, the environmental hazard problems, and in fact didn't insure polluters.

Take a company like ours, during the critical years we typically would insure a hardware store, a department store somewhere on Main Street. We wrote commercial policies, but those insureds were not involved in creating pollution.

Mr. HOUGHTON. I understand, and you said that only those companies involved, regardless of whether the tax is retrospective or prospective, should be involved in this process.

Mr. STEINBERG. That is correct.

Mr. HOUGHTON. But the money has to come from somewhere and we don't print it ourselves. In otherwords, it has to be a private generation of these funds, but I just can't still understand why there isn't some way for the insurance industry as such to make reasonable recommendations. If the Treasury hasn't talked to you, maybe you should talk to them. I was in business a long time and, I used to talk to them. You may want to do the same thing. How about the rest of you?

Mr. LANDGRAF. Congressman, we have been in discussions with Treasury about largely technical problems we have as foreign insurers and reinsurers with the mechanism proposed by Treasury. As to the percentages, frankly, it is something that the domestics, the two seemingly irreconcilable parts of the domestic industry need to come together.

We are pleased to meet with those disparate groups when they do meet to discuss that, but the principle, we believe, is that the retrospective portion of any such compromise needs to come to an end at a very foreseeable and certain date.

Ms. KENWORTHY. Congressman, I would like to make just one comment, and it doesn't necessarily help you resolve your dilemma here, but I will say that a great deal of work has gone into H.R. 3800 and a great number of people have made serious compromises to get this legislation where it is today, and I think it would be a travesty if the fact that the insurance industry cannot agree spoils all the work that has been done so far in all of the very excellent reforms that are represented in this bill so that we don't get this legislation concluded this year.

Mr. HOUGHTON. So what you are saying in effect is that the chemical companies, the petroleum companies, and others who have been affected, are in general agreement. Instead, it is the insurance companies who are sort of holding out and can't reach an agreement? Am I putting words in your mouth?

Ms. KENWORTHY. Well, I don't want to express it quite that harshly, but we have made substantial compromises among ourselves in the business community and with the environmental community, and with a good representation of the insurance industry, and I think it is important that that compromise be valued.

Mr. HOUGHTON. Thank you. Mr. Chairman, I am finished with my questions.

Mr. PICKLE. Mrs. Kennelly.

Mrs. KENNELLY. Thank you, Mr. Chairman. Mr. Harrison, you have made it clear that you would be in favor of 100 percent retroactive. If that happened, would you support the bill?

Mr. HARRISON. Well, I wouldn't support the bill regardless because I think there is a better way to go about doing it, but if that is the bill and it is enacted, yes, we would support it, but we think there is a better way to approach it. We think a broad-based tax collected from all industries is the correct way to do it.

Mrs. KENNELLY. In your testimony, Mr. Harrison, you made the point that you thought that this should be limited to commercial lines. Now, I didn't hear anybody mention any personal lines. Is there any particular line you are concerned about?

Mr. HARRISON. Well, the prospective tax language differs from the retrospective tax language. In the prospective it says all property lines, and in the retrospective it refers to package policies so there is a difference. A lot of our NAMIC companies write property, and are not even authorized to write liability, so they would be taxed on a prospective basis even though they have no liability coverage whatsoever.

Mrs. KENNELLY. Thank you. Mr. Landgraf, I wonder if you would like to respond to Mr. Greenberg's remarks that the foreign companies would get a total bailout if this went forward, as it is being suggested.

Mr. LANDGRAF. It is difficult to know where to begin. I think his comments, as we have shown by citing the A.M. Best study, are a gross misunderstanding of what business foreign insurers, particularly the London market, which I represent, did write, in fact, in the 1970s and 1980s.

Much of the capacity of the London market, including my clients, was devoted during those decades to responding to the medical malpractice crisis and the directors and officer crisis in the United States lines, which are not by anyone's estimation implicated by Superfund. Moreover, the London market continued to take care of its historical, global international business in the aviation, marine, and space insurance markets.

A great deal was also written as property reinsurance catastrophe protection, again the kind of thing that has nothing to do with Superfund. Certainly, my clients have acknowledged that they have an exposure, as does the domestic market. To suggest that excess insurers somehow have a greater exposure than the primary insurers is simply to stand on its head the logic of the market.

Any given Superfund site has many, many PRPs, each of which is a policyholder with many policies, primary policies over many years of contamination, all of which are usually called into play or attempted to be called into play before excess layers in any of those policy years ever respond to the risk. The real question is who has the exposure, I suppose, but the exposure is not in any sense, as Mr. Greenberg's own testimony points out, a function of the premium charges that were made at the time. He says he didn't collect a premium for pollution. Nor did we collect a premium for pollution. He has no idea what kind of pricing was engaged in by Lloyd's or any other London market insurer at the time. Thank you.

Mrs. KENNELLY. I just want to say that I have had people—upset about the combined effect of the deminimum rule and the way it

is stacked. You buy so much insurance from one company, then another company, then when you run out you have to go to a foreign company and when you put that with the de minimis rule, it has been suggested to me that there is a possibility. It was not only Mr. Greenberg who has expressed this and I just thought you should know that other people are concerned.

Mr. LANDGRAF. Thank you for that notice. I would just say that garden variety general liability for Main Street America or corporate America was certainly one part of what the London market was writing, but it was never the historical concentration of the London market. They are a truly global market that responds to exotica from Betty Grable's legs to space satellites, and to suggest that what Main Street America insurance industries were writing were somehow disproportionately a London market problem really is contrary to reason as well as the A.M. Best study, which suggests that even taking into account reinsurance and this excess layering issue, that it is no more than 10 to 30 percent total foreign.

Mrs. KENNELLY. Thank you very much for clarifying that. Thank you. Thank you, Mr. Chairman.

Mr. PICKLE. Mrs. Johnson, before I recognize you, did you say that you insured Betty Grable's legs?

Mr. LANDGRAF. I am told. I wasn't around, but——

Mr. PICKLE. Is that why we set the 1971 date? Mrs. Johnson.

Mr. LANDGRAF. Perhaps so.

Mrs. JOHNSON. Mr. Chairman, they certainly were a well known asset.

Mr. Harrison, as an insurance company person, a person with experience in the industry, what would you have to do to deal with a retroactive liability?

Mr. HARRISON. What would I have to do to deal with it? I am not——

Mrs. JOHNSON. In other words, if this law resulted in your having to pay a retroactive tax, would that have a different impact on your company than if it shouldered you with a retroactive liability?

Mr. HARRISON. Well, first of all, our company, as far as we know, has no—but if we did——

Mrs. JOHNSON. Assume you did.

Mr. HARRISON. If we did have retroactive liability and we knew about it, we would certainly set up our reserves to take care of that liability.

Mrs. JOHNSON. In the process of setting up reserves, where do you get those reserve dollars?

Mr. HARRISON. Well, we would establish reserves. They would come out of our surplus.

Mrs. JOHNSON. When you put dollars from your surplus into your reserve, what does it do to your ability to sell?

Mr. HARRISON. It hurts us, of course.

Mrs. JOHNSON. It diminishes it. One of the problems with the whole retroactive approach is that it creates a double burden. It not only forces companies to pay higher taxes, but it also takes their assets out of earnings, and puts them in a position where they can't earn as much as if we hadn't forced that liability on them. So it seems to me a double burden, and since the people that

you insure, while you didn't insure them for this particular problem, certainly every one of them used Ebanoff or some comparable product, so really every single one of us is part of creating superfunds.

One of the things that disturbs me is that we should try to focus the liability for something that, A, we didn't understand as we created it, B, which we were all a part of contributing to on a rather narrow sector of either the market or the people. I think your people contributed just as much trash to the trash stream that was lethal as everybody else, so the retroactive structure not only imposes enormous costs on the companies that are identified, but it takes money out of profit to be set aside against these liabilities and therefore takes them out of the earnings stream so you pay in a sense the tax twice. You diminish your earning capability at the same time you increase your costs; isn't that so?

Mr. HARRISON. Well, maybe I am a little selfish in this and maybe 80 percent of the industry is, but as we said at many times, most of us had no liability during those years and, yes, we would have to establish a reserve for a tax. A liability tax would have to be put up immediately, I would assume, but we would not be double taxing ourselves because we do not have any liability exposure. I am speaking now of 80 percent of the industry.

Mrs. JOHNSON. You would just have to find the money to pay the tax. You wouldn't have to reserve?

Mr. HARRISON. Well, no, I assume that if my retrospective tax is $1 million I would, come December 31, have to put up $1 million in reserve to take care of that tax even though it is paid out over the next 5 to 10 years. You immediately have to establish a reserve. Looking at it from my own standpoint, perhaps my company might be better off with a prospective tax if I stop to analyze it. I know that 80 to 85 percent of the industry and certainly many NAMIC companies would be severely hurt under a prospective tax, and that is what I am here representing, NAMIC.

Mrs. JOHNSON. I appreciate your comments. I fail to see the economic value of retroactivity as opposed to prospective planning, and when you look at the problems that retroactive actions by Washington have created in whatever arena we have passed them, I certainly think that the burden of proof on those who want this to be retroactive is far greater than is currently being shouldered, but I appreciate your testimony. Thank you.

Mr. PICKLE. Thank you. I think that constitutes all the questions we have for this panel unless anybody else—we thank you very much for your testimony.

Acting Chairman GIBBONS. Now the Chair will ask the third and last panel to come forward: Jerry Howard, accompanied by Arnie Klingenberg, representing the American Petroleum Institute; Sean Crimmins for the Chemical Manufacturers Association; for the Industrial Compliance Corp., John Spisak; and for the Drycleaners Environmental Fund, Richard Miller.

If those people would come and take their position.

Gentlemen, I welcome you to this hearing today. I know it has been a long session if you came at the beginning of the session this morning. It has been a long one for us, too. So we are not going

to try to hold you long, but we do want to get your statement on the record.

Acting Chairman GIBBONS. I am going to recognize each one of you on the basis of the list in front of me. First, we will hear from Jerry Howard, chairman of the General Committee on Taxation representing the API, American Petroleum Institute.

Mr. Howard.

STATEMENT OF JERRY HOWARD, CHAIRMAN, GENERAL COMMITTEE ON TAXATION, AMERICAN PETROLEUM INSTITUTE; AND DIRECTOR OF TAX AND FINANCIAL PLANNING, MARATHON OIL CO., HOUSTON, TEX.

Mr. HOWARD. Thank you, Mr. Chairman. I am also accompanied here today by Arnie Klingenberg, the environmental consultant for Mobil Oil Corp.

API members will be significantly affected by the changes that Congress elects to make to the Superfund program. We support the concept of a Superfund to clean up orphaned waste sites, but there is much about Superfund that needs to be fixed, and we commend the Congress for your efforts to remedy the current law.

My testimony will focus on three aspects of funding: the need to broaden the base of funding for Superfund, potential diversion of the corporate environmental tax and the proposed Environmental Insurance Resolution Fund.

The current Superfund funding scheme is inequitable because it imposes the lion's share of the taxes on one industry and its products. When you combine the effects of the three Superfund taxes—the petroleum tax, the chemical tax and the corporate environmental tax, or CET—the petroleum industry pays between 55 and 60 percent of the total taxes dedicated to financing the Superfund Trust Fund. At the same time, this industry is responsible for a very small portion, less than 10 percent, of the contamination at Superfund sites.

The need to clean up orphan wastes is a broad societal problem that should be paid for through general revenues or broadly based funding sources. Recognizing these concerns, Congress included the broad-based CET as one source of funding when it reauthorized Superfund in 1986. Despite that action, the petroleum industry continues to pay almost 60 percent of the taxes, as demonstrated by the diagram attached to my testimony.

The API supports an extension of the Superfund of the size the administration has proposed. However, we continue to believe that more of the funding should be provided through general revenues or broad-based taxes.

The API is also very concerned about recent proposals to divert revenues generated by the corporate environmental tax to purposes other than Superfund.

As part of its reform of the CERCLA liability provisions, the administration has proposed moving to proportional liability and creating a new mandatory spending program to pay for orphan shares at multiparty Superfund sites. The orphan share program would be scored for budget purposes as being Funded by revenues from reauthorizing the CET. It was API's understanding that, under this

proposal, the cost of orphan share cleanup would be adequately funded without additional taxes.

Now, unfortunately, the administration has also proposed scoring revenues from reauthorizing the CET to partially fund other programs, including welfare reform and the GATT implementing legislation.

We are concerned that the Joint Committee on Taxation estimates for CET reauthorization are significantly lower than Treasury estimates and that there is not sufficient revenue to offset both the orphan share program and welfare reform, as the OMB contends.

Furthermore, even the appearance of diverting revenues from the CET to purposes other than Superfund would contravene Congress' intent and could cause some to question its reauthorization. We urge the committee to reject any proposals to use revenues from the CET for anything other than its statutorily mandated purpose.

The final issue I will address is funding for the environmental insurance resolution fund, or EIRF. H.R. 3800 establishes this new fund intended to eliminate disputes over insurance claims related to Superfund liability for disposal of wastes which occurred prior to 1986. Seventy percent of the funding would be retrospective and 30 percent prospective.

As payers of the lion's share of the current Superfund taxes, API members are concerned that they are not burdened by any new taxes which are to be used to settle disputes between insurance companies and their policyholders for past disposal.

Mr. Chairman, as I said at the outset, the API and its members support the concept of a Superfund. There is much about the current law that needs to be improved, and we encourage the Congress to continue its efforts.

This concludes my testimony.

[The prepared statement and attachments follow:]

STATEMENT OF
JERRY HOWARD, MARATHON OIL
ON BEHALF OF
AMERICAN PETROLEUM INSTITUTE
REGARDING THE FINANCING PROVISIONS OF H.R. 3800

Committee on Ways and Means
U.S. House of Representatives
July 25, 1994

Thank you, Mr. Chairman. My name is Jerry Howard. I am Director of Tax and Financial Planning for Marathon Oil Company, and I am appearing today for the American Petroleum Institute. I am accompanied by Arnie Klingenberg, Environmental Consultant, Mobil Oil Corporation. API members will be significantly affected by the changes that Congress elects to make to the Superfund program -- as members of the community, as potentially responsible parties, and as taxpayers.

We support the concept of a Superfund to clean up orphaned waste sites. But, there is much about Superfund that needs to be fixed, and we commend the Congress for your efforts to remedy the current law.

My testimony will focus on three aspects of funding: the need to broaden the base of funding for Superfund, potential diversion of the Corporate Environmental Tax, and the proposed Environmental Insurance Resolution Fund.

The current Superfund funding scheme is inequitable because it imposes the majority of the taxes on one industry and its products. When you combine the effects of the three Superfund taxes -- the petroleum tax, the chemical tax, and the corporate environmental tax (or CET) -- the petroleum industry pays between 55 and 60 percent of the total taxes dedicated to financing the Superfund Trust Fund. At the same time, this industry is responsible for a very small portion -- less than 10 percent -- of the contamination at Superfund sites.

The need to pay for the cleanup of orphan wastes disposed in the past by a wide range of companies, industries and government agencies is a broad societal problem that should be paid for through general revenues or broadly based funding sources. Recognizing these concerns, Congress included the broad-based CET as one source of funding when it reauthorized Superfund in 1986. Despite that action, the petroleum industry continues to pay almost 60 percent of the taxes, as demonstrated by the diagram attached to my testimony.

The API supports an extension of the Superfund of the size the Administration has proposed. However, although the Administration's bill does not propose any increases in the current taxes, we continue to believe that more of the funding should be provided through general revenues or broad-based taxes.

The API is also very concerned about recent proposals to divert revenues generated by the Corporate Environmental Tax to purposes other than Superfund.

As part of its reform of the CERCLA liability provisions, the Administration has proposed in HR 3800 moving to proportional liability and creating a new mandatory spending program to pay for "orphan shares" at multi-party Superfund sites. The orphan share program would be scored for budget purposes as being funded by revenues from reauthorizing the CET. It was API's understanding that under this proposal, the cost of orphan share cleanup would be adequately funded without any additional taxes.

Now, unfortunately, the Administration has also proposed scoring revenues from reauthorizing the CET to partially fund other programs, including welfare reform and the GATT implementing legislation. They have subsequently withdrawn the GATT funding proposal, but continue to propose the CET as an offset for welfare reform.

We are concerned that the Joint Committee on Taxation estimates for CET reauthorization are significantly lower than Treasury estimates, and that there is not sufficient revenue to offset both the orphan share program and welfare reform, as the OMB contends. Furthermore, even the appearance of diverting revenues from the CET to purposes other than Superfund would contravene Congress's intent and could cause some to question its reauthorization. We urge the Committee to reject any proposals to use revenues from the Corporate Environmental Tax for anything other than its statutorily mandated purpose.

The final issue I will address is funding for the Environmental Insurance Resolution Fund, or EIRF. HR 3800 establishes this new fund intended to eliminate disputes between insurance companies and their insureds over insurance claims related to Superfund liability for disposal of wastes which occurred prior to 1986. 70% of the cost of the Fund would come from fees on policies written between 1971 and 1986, 30% would come from a tax on policies written after date of enactment.

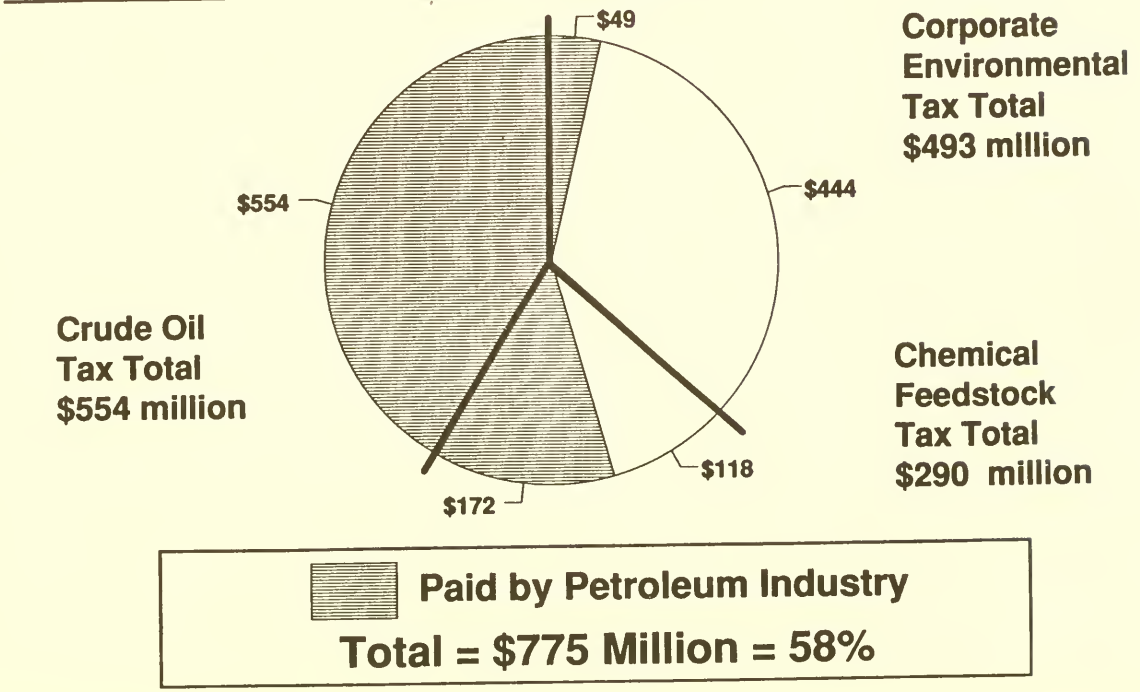
As payers of the lion's share of the current Superfund taxes which fund the cleanup of wastes that were disposed in the past by companies that no longer exist, are not solvent or cannot be identified, API's members are concerned that they not be additionally burdened by any new taxes which are to be used to settle disputes between insurance companies and their policyholders for past disposal actions.

Mr. Chairman, as I said at the outset, the API and its members support the concept of a Superfund. There is much about the current law that needs to be improved and we encourage the Congress to continue its efforts.

This concludes my testimony. I will be happy to answer any questions.

Annual Average 1988-90 Superfund Taxes

$1,337 Million



AMERICAN PETROLEUM INSTITUTE

WRITTEN STATEMENT TO ACCOMPANY
TESTIMONY OF
JERRY HOWARD, MARATHON OIL
ON BEHALF OF AMERICAN PETROLEUM INSTITUTE
REGARDING THE FINANCING PROVISIONS OF H.R. 3800

Committee on Ways and Means
U.S. House of Representatives
July 25, 1994

This statement is submitted on behalf of the American Petroleum Institute (API) for the record of the Committee on Ways and Means July 25, 1994 hearing on the financing provisions of the Administration's Superfund proposal, H.R. 3800, the Superfund Reform Act of 1994.

API represents approximately 300 member companies involved in the exploration for and production, refining, transportation, and marketing of petroleum and petroleum products. API members will be significantly affected by the changes that Congress elects to make to the Superfund program -- as members of the community, as potentially responsible parties (PRPs), and as taxpayers. Much about Superfund needs to be changed, and Administration officials and members of Congress are to be commended for their efforts to remedy the current law and regulations.

THE CURRENT SUPERFUND TAX SCHEME

A major area that needs reform is the current inequitable CERCLA funding scheme which imposes the majority of the taxes on one industry and its products. The Superfund program is intended to clean up "orphan wastes" disposed of in the past by companies which no longer exist, are not solvent or cannot be identified. Identified, solvent parties must themselves clean up or pay for the cleanup of any wastes for which they are responsible. Furthermore, the evidence is incontrovertible that responsible parties for abandoned hazardous wastes that have accumulated over many years encompass a wide range of companies, industries and government agencies of all sizes and types located throughout the United States. The need to pay for the cleanup of the "orphan wastes" is a broad societal problem that should be paid for through general revenues or broadly based funding sources. Recognizing these concerns, Congress included the broad-based Corporate Environmental Tax as one source of funding when it reauthorized CERCLA in 1986.

Yet, despite that action, the petroleum industry continues to pay between 55 and 60 percent of the taxes dedicated to financing Superfund. The API supports an extension of the Superfund of the size the Administration has proposed. However, we continue to believe that more of the funding shoud be provided through general revenues or broad-based taxes.

Three tax sources, in addition to modest general revenues, provide dedicated funds for the Superfund Trust Fund. Petroleum companies make payments to the federal government under each of these taxes: the tax on petroleum, the tax on chemicals, and the corporate environmental tax. Data on each of these taxes, and the petroleum industry's share, are summarized below and in the attached table.

Tax on Petroleum:

According to Internal Revenue Service reports on excise tax collections, the petroleum tax generated $547.6 million in 1988,

$570.5 million in 1989, and $545.2 million in 1990 (calendar year data). This amount is paid only by companies operating in the petroleum industry.

Tax on Chemicals:

According to the same Internal Revenue Service reports, $294.3 million was collected under the chemical tax in calendar year 1988. For 1989 and 1990, $277.7 million and $296.0 million were collected, respectively. According to estimates based on plant level chemical production capacity as reported by the Chemical Economic Handbook, the share of the chemical tax paid by petroleum industry companies is in the 56 percent to 63 percent range.

Using the 56 percent to 63 percent range as the petroleum industry's share of the chemical tax yields petroleum industry chemical taxes of $152 million to $189 million per year over the 1988 to 1990 period, as shown in the attached table.

Corporate Environmental Tax:

The U.S. Department of the Treasury reports that $487.9 million, $471.8 million, and $520.2 million in corporate environmental taxes were collected in calendar years 1988, 1989, and 1990, respectively.

The petroleum industry's share shown in the attached table--8.6 percent for 1988 and 9.4 percent for 1989, and 11.6 percent for 1990 -- is the total for two industry categories contained in the Treasury data. These are "oil and gas extraction" and "petroleum (including integrated) and coal products". Based on the Treasury data, the petroleum industry paid $42.0 million, $44.5 million, and $60.4 million in corporate environmental taxes in 1988, 1989, and 1990, respectively.

Totals for Petroleum, Chemical, and Corporate Environmental Taxes:

Based on the above data, it is estimated that during 1988, 1989, and 1990, the petroleum industry paid about 57 percent to 60 percent of the total petroleum, chemical, and corporate environmental taxes dedicated to financing the Superfund Trust Fund.

Petroleum Industry's Contribution to NPL Site Contamination:

Very limited data are available on a given industry's likely share of contamination at Superfund sites on the current national priorities list (NPL). An Environmental Protection Agency report, Superfund NPL Characterization Project: National Results, includes survey information on "industries responsible for generating the wastes that occur at the site." The report indicates that about 52 percent of the sites have wastes generated by the manufacturing industry. At the sites with manufacturing industry generated waste, 8.5 percent of the sites have wastes from "petroleum refining and related industries". Based on the EPA Superfund NPL Characterization Project: National Results report, about 4.4 percent (8.5 percent times 52.2 percent) of NPL sites have wastes generated by "petroleum refining and related industries".

It has been observed that the petroleum industry also owns some mining facilities and chemical plants. It is unclear from the EPA report whether the "related industries" in the "petroleum refining and related industries" category includes the mining or chemical facilities owned by petroleum companies. However, even doubling the 4.4 percent figure, to allow for the possiblility that some wastes from petroleum industry owned mining and chemical operations are reported in other categories, implies

that the petroleum industry may be a major contributor of wastes at less than 10 percent of the NPL sites.

Although the petroleum industry pays almost 60 percent of the Superfund taxes, it is responsible for only a very small portion - less than 10 percent - of NPL site contamination problems.

Given this clearly inequitable imposition of the tax burden, API strongly believes that the CERCLA tax base should be broadened.

DIVERSION OF THE CORPORATE ENVIRONMENTAL TAX

The Section 59A Corporate Environmental Tax (CET), enacted as part of the 1986 Superfund Amendments and Reauthorization Act (SARA), is one of the taxes dedicated to the Superfund Trust Fund. IRC Section 9507 provides that amounts equivalent to the taxes received in the Treasury under Sections 59A, 4611, 4661, or 4671 are appropriated to the Superfund, and that amounts in the Superfund shall be available only to make expenditures to carry out specified purposes of CERCLA. API opposes recent proposals to divert revenues generated by the CET to other purposes.

The Superfund taxes are due to expire December 31, 1995. HR 3800 provides that these taxes be reauthorized at their current rates through December 31, 2000.

The Administration has proposed -- as a part of HR 3800's reform of the CERCLA liability provisions -- to create a new mandatory "orphan share" spending program, scored as funded by revenues from the reauthorized CET. This provision is a crucial part of the move to proportional liability -- the basic reform of the CERCLA liability system contained in the Administration's bill. It was API's understanding that, under the Administration's proposal, the cost of orphan share cleanup would be adequately funded without any additional taxes. Because the budget baseline does not include an assumption that the CET will be reauthorized, revenues from the reauthorization of the CET may be scored against mandatory spending programs; hence, under HR 3800, no new taxes would be needed to fund the orphan share program.

Unfortunately, the Administration has recently proposed scoring revenues from reauthorizing the CET to partially fund other programs, including welfare reform and the GATT implementing legislation. (They have subsequently withdrawn the GATT funding proposal, but continue to propose the CET as an offset for welfare reform.)

The Office of Management and Budget (OMB) contends that there is sufficient revenue from CET reauthorization to score for both purposes - Superfund orphan share funding and welfare reform. Furthermore, regarding their proposals to budget score CET for purposes other than Superfund, the OMB insists that "no Superfund receipts will be used for anything other than the Superfund program" and that the appearance that Superfund taxes are being used to fund some other program is "simply the result of budget scorekeeping conventions." Nevertheless, we are concerned that because the Congressional Budget Office estimates for CET reauthorization are significantly lower than OMB's estimates, there is not sufficient revenue to offset both the Superfund orphan share program and welfare reform.

Furthermore, even the appearance of diverting revenues from the Corporate Environmental Tax to purposes other than that for which it was enacted raises the specter that it can be severed from its environmental purpose which would break faith with those industry groups that were party to the 1986 SARA agreement and could cause some to oppose its reauthorization.

We urge the Committee to reject any proposals to use revenues from the Corporate Environmental Tax for other than its statutorily mandated purpose.

ENVIRONMENTAL INSURANCE RESOLUTION FUND

HR 3800 establishes a new Environmental Insurance Resolution Fund (EIRF) intended to eliminate disputes over liability coverage for cleanup costs between insurance companies and their insureds who are potentially responsible parties (PRPs). The EIRF would provide settlement of insurance claims related to Superfund liability for pre-1986 disposal of waste. The Environmental Protection Agency estimates that litigation over these claims costs approximately $300 million per year.

The EIRF is financed under the bill by two types of "fees" on applicable casualty insurance policies: the first imposed on insurance premiums written during the 15 calendar year period beginning with calendar year 1971 (the retrospective fee), and the second imposed on premiums on policies written after date of enactment of the bill (the prospective fee). According to the Administration, the bill is intended to impose 70% of the cost of the EIRF on the retrospective fee and 30% on the prospective fee.

As policyholders and PRPs, and as payers of the lion's share of the current Superfund taxes, API's members are concerned that they not be additionally burdened by these new fees which are designed to relieve insurance companies of liability coverage for pre-1986 actions.

Estimated Superfund Taxes Paid By Petroleum Companies
(Million Dollars)

	1988	1989	1990
Petroleum Tax:			
Total collected [1]	$547.6	$570.5	$545.2
Petroleum industry:			
Estimated share	100%	100%	100%
Estimated total	$547.6	$570.5	$545.2
Chemical Tax:			
Total collected [1]	$294.3	$277.7	$296.0
Petroleum industry:			
Estimated share [2]	58% - 64%	55% - 62%	56% - 62%
Estimated total	$170.4 - $188.9	$151.6 - $170.8	$164.3 - $183.2
Corporate Environmental Tax:			
Total collected [3]	$487.9	$471.8	$520.2
Petroleum industry:			
Estimated share [3]	8.6%	9.4%	11.6%
Estimated total	$42.0	$44.5	$60.4
Total of Above			
Total collected	$1,329.8	$1,320.0	$1,361.4
Petroleum industry			
: Estimated share	57% - 58%	58% - 60%	57% - 58%
Estimated total	$760.0 - $778.5	$766.6 - $785.8	$769.9 - $788.8

[1] As reported in Internal Revenue Service "SOI Bulletin" for Winter 1992-93; Winter 1991-1992 (Volume 11, Number 3); and Fall 1990 (Volume 10, Number 2), calendar year data.

[2] See API paper, "Revised Estimates of Superfund Chemical Taxes Paid by Petroleum Companies" (6/30/94), for details of this estimate. Briefly, the estimates are based on individual plant capacity data for 5 petrochemicals. These 5 petrochemicals (benzene, ethylene, propylene, toluene, and xylene) accounted for about 90 percent of petrochemical tax revenue and 71 percent of all chemical taxes in 1990, and similar shares in 1988 and 1989. The lower estimate excludes any taxes paid on 6 other taxed petrochemicals for which capacity data was not obtained. The higher estimate assumes the petroleum industry capacity tax shares for these 6 petrochemicals was the same as the average of the 5 petrochemicals for which data was obtained.

[3] U.S. Department of the Treasury, "1988 Statistics of Income: Corporate Income Tax Returns," Publication 16 (Rev. 11-91), Tables 1 and 2; "1989 Statistics of Income: Corporate Income Tax Returns", Tables 1 and 2; and "1990 Statistics of Income: Corporate Income Tax Returns", Tables 1 and 7. Petroleum industry share is the sum of "Oil and gas extraction" and "Petroleum (including integrated) and coal products" categories.

Mr. PICKLE [presiding]. Now we will hear from Mr. Crimmins representing the Chemical Manufacturers Association.

STATEMENT OF SEAN T. CRIMMINS, FEDERAL LIAISON, TAX POLICY COMMITTEE, CHEMICAL MANUFACTURERS ASSOCIATION; AND VICE PRESIDENT AND GENERAL TAX COUNSEL, ASHLAND OIL, INC.

Mr. CRIMMINS. Thank you, Mr. Chairman.

My name is Sean T. Crimmins, vice president and general tax counsel for Ashland Oil, Inc., and I am here on behalf of the Chemical Manufacturers Association. We appreciate this opportunity to address the Committee on Ways and Means on H.R. 3800, the Superfund Reform Act of 1994.

I request that our written statement be included in the hearing record and will summarize my remarks.

CMA is a nonprofit trade association. Our member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States.

In 1993, the U.S. chemical industry was the Nation's largest exporter, and today the industry provides 1.1 million high wage, high-tech jobs for American workers. Our net trade surplus has sharply declined from $19.2 billion in 1991 to $16.6 billion in 1993. Moreover, the U.S. share of world exports of chemicals has declined from 15.5 percent in 1970 to 13.8 percent in 1993, more than 21 percent of our former market share.

Since the enactment of Superfund, the U.S. chemical industry has paid substantially in excess of $3 billion in Superfund taxes and related costs. In addition, our industry has paid billions of dollars directly to clean up sites and also by our contributions through EPA cost recovery actions.

Despite these high costs to the chemical industry, CMA is committed to Superfund reform and strongly supports the enactment of H.R. 3800 as passed by the House Energy and Commerce Committee. This bill will reduce the endless disputes and litigation that have ensnarled the Superfund program and will accelerate the actual cleanup of the Nation's hazardous waste sites.

One central feature of H.R. 3800 is a provision for funding reimbursements for eligible parties for costs incurred and equitably attributed to orphan shares. This will enable the remaining potentially responsible parties at Superfund sites to reach for rapid settlements with EPA and to get on with the actual cleanup of hazardous waste sites.

We also strongly support the administration's request to extend the Superfund excise taxes on chemicals and petroleums and the corporate environmental tax at existing rates for 5 additional years as part of this legislation.

In this respect, I should note that our members are greatly troubled by proposals to use the CET, which is now pledged to the Superfund Trust Fund, to meet the budget needs of other programs. CMA is unalterably opposed to using the CET for any non-Superfund purpose. Both the Congressional Budget Office and the Office of Management and Budget are on record that H.R. 3800 will require every dollar of the Superfund tax revenues.

Mr. Chairman, the only certain way to ensure that the Superfund reform bill will meet the congressional budget test is to include the provisions extending the current Superfund taxes on this bill. We urge that you do so now.

Thank you for your attention.

Mr. PICKLE. Thank you for why you testimony and your positive statement.

[The prepared statement follows:]

STATEMENT OF

SEAN T. CRIMMINS

ON BEHALF OF

CHEMICAL MANUFACTURERS ASSOCIATION

BEFORE THE HOUSE COMMITTEE ON WAYS AND MEANS

ON

THE FINANCING PROVISIONS OF H.R. 3800

"THE SUPERFUND REFORM ACT OF 1994"

July 25, 1994

The Chemical Manufacturers Association ("CMA") appreciates this opportunity to address the Committee on Ways and Means on the financing provisions of H.R. 3800, "The Superfund Reform Act of 1994."

CMA is a non-profit trade association. Our member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. The U.S. chemical industry provides 1.1 million high-wage, high-tech jobs for American workers.

For the years 1991, 1992, and 1993, the chemical industry was the leading U.S. exporter with total exports of $45.1 billion in 1993. Regrettably, that fact masks the much more serious and immediate problem that our net trade surplus sharply declined over that same period from $19.2 billion in 1991 to $16.6 billion in 1993. Domestic and international trade in chemicals is under severe pressure because of weak product demand and excess supply in Europe and because of the large expansion of production in East Asia. According to United Nations data, the U.S. share of world exports of chemicals fell from 17.5 percent in 1970 to 13.8 percent in 1993. That represents a decline of more than 21 percent in total worldwide market share. The U.S. chemical industry is fighting desperately to maintain the competitiveness of its products in domestic and international markets and the 1.1 million American jobs that competitiveness supplies.

Our industry is, therefore, under great pressure to keep all our costs, including taxes, in line with those of international competitors. Since the enactment of Superfund, the U.S. chemical industry has paid substantially in excess of $3 billion in Superfund taxes and related costs. In addition, the chemical industry has paid billions of dollars directly to clean up sites and by our contributions through EPA cost recovery actions.

Yet, CMA strongly supports enactment of H.R. 3800, the Administration's Superfund reform proposal. We believe that the bill's provisions for the allocation of liabilities under a new fair share liability standard, improved remedy selection and settlement options will effectively reduce the endless disputes and litigation that have characterized the Superfund program since its enactment in 1980. Most importantly, we believe this bill will greatly accelerate the actual clean up of the nation's hazardous waste sites.

One important feature of H.R. 3800 that is central to the bill's accelerated settlement reforms is the provision for funding reimbursements to eligible parties for costs incurred and equitably attributed to orphan shares. In general, orphan share liabilities are those that are attributable to potentially responsible parties (PRPs) that are defunct, insolvent, or otherwise unable to pay their liabilities. Not only does funding orphan share liabilities correct the inequity of compelling one party to pay damages attributable to another party, it provides the revenues needed for the bill's exemptions for small business and limitation on municipal liabilities.

Title IX of H.R. 3800 would fund the Superfund program by extending the present Superfund excise taxes at existing rates on chemical feedstocks, imported chemical derivatives, petroleum and petroleum products, and the CET for five additional years. These taxes impose a substantial financial burden on the chemical industry. CMA, nonetheless, urges the Committee on Ways and Means to support the Administration's proposal to extend these taxes at existing rates for five additional years.

The original proposal of the Administration also would have taxed insurance companies to fund the settlement of Superfund liability claims of insured parties. H.R. 3800, as reported by the House Energy and Commerce Committee, contains no provision on this subject. We are, therefore, reserving our comments until we have reviewed specific statutory language.

Over the past few weeks, our members have been greatly troubled by proposals to use the CET which is now pledged to the Superfund trust fund to meet the budget needs of other programs. **CMA is unalterably opposed to using the CET for any non-Superfund purpose.** These proposals are frequently couched in confusing discussions of budget pay-go credits, yet they suggest and imply that these taxes are not needed for the Superfund program which is certainly not correct. The Congressional Budget Office is on record that the Administration's Superfund reform program will require every dollar of these tax revenues. We applaud the Committee on Ways and Means for moving forward the responsible reform of Superfund by holding hearings on this bill.

CMA, therefore, urges that you adopt the Administration's request to extend at existing rates the Superfund excise taxes on chemicals and petroleum and the corporate environmental tax for five additional years to fund the provisions of H.R. 3800 as reported by the House Committee on Energy and Commerce. We strongly support the progress toward responsible Superfund reform in this Congress that this bill represents. The past 13 and 1/2 years of the administration of the Superfund program attest to just how very much these reforms are needed today.

Mr. PICKLE. Now we hear from Mr. John Spisak, CEO of Industrial Compliance, Inc.

STATEMENT OF JOHN F. SPISAK, PRESIDENT AND CHIEF OPERATING OFFICER, INDUSTRIAL COMPLIANCE, INC., GOLDEN, COLO.

Mr. SPISAK. Thank you, Mr. Chairman and members of the committee.

I am John Spisak, president and CEO of Industrial Compliance. We are an environmental engineering and consulting firm in Golden, Colo., with offices throughout the United States. We actually have to clean up these Superfund sites, and we know firsthand about the program, its costs and its problems.

We are here today before this committee which is focusing on funding Superfund and a 10-year package of $8 billion in new taxes which, by the way, is nearly one-half of the amount Superfund has already spent to clean up only about 200 sites of the 1,500 on the NPL.

We all know the principal indictments against Superfund: too slow, too costly, welfare for lawyers. I am a scientist and engineer. I look for tools and solutions to problems. Process never solved a problem. With apologies to my friends in agriculture, a cow is process. Lots of stomachs, lots of regurgitation, high cost and plenty of foul hot air, yet it solves nothing while creating a product that requires yet more process through pasteurization, homogenization, et cetera.

H.R. 3800, like the current Superfund, is mostly process: litigation or allocation for shares, litigation or panels to determine who pays, litigation to fight EPA's hair-brained remedies. A lawyer's playground. H.R. 3800 and its EIRF rearranges the stomachs and regurgitates process, but it is more process, not a tool and not a solution.

When you review H.R. 3800 and its EIRF, ask the question: Is this process or a tool? Process or a solution?

Please listen to the language. Listen to the proponents of H.R. 3800. They say solution, but they describe its complexity, process. We listen to Treasury's intricate and complex process description.

Almost every speaker today has focused on the disaster of retroactive liability, the core problem of Superfund, and yet we have also wrestled with the intractable problems of how to come up with a fair process. You have heard H.R. 3800 is better than the current program, that it is an improvement. Better for the player or better for the victim?

Take the EIRF. Is it a better process or a real solution and for whom? Processes don't help people who live near the sites. Solutions do. Remember, H.R. 3800 sets a share of an unknown, not a fixed dollar amount. Is that a recipe for success?

Let's look at the problem. First, Superfund is far too slow. It is burdened with process.

Second, Superfund spends huge amounts of money with no discernible progress in cleanups.

Third, Superfund bleeds resources from communities and large and small businesses while still stifling development.

These are problems that beg solutions.

What does H.R. 3800 and its EIRF actually do? Remember the problem. First, it asks for more process. Process, by definition, means delay. Eighteen months for allocation, a process to determine shares and treatment under the EIRF, maneuvering and struggling to increase allocation and potential EIRF shares. During all of this, no cleanup.

Second, the EIRF excludes whole classes of businesses and taxes new businesses with no reduction in their liability. It creates new incentives to spend money for consultants and lawyers to reduce allocation and gain favorable position under the EIRF. It encourages companies to fight EPA remedies since EIRF moneys will not be equally shared.

Lots of happy lawyers. No discernible results in the field. No solutions for people here, just more process for the combatants.

You have been told that this is the most amazing and diverse coalition ever put together, yet it is a coalition focused on special interest treatment within a framework of process, not solution. H.R. 3800 is a process bill. Look at the language and the focus, its structure. You won't find targets and solutions.

The gentleman from Texas focused on lists of 50 or so companies that support this coalition. ASAP has submitted a list of over 300 companies to Chairman Mineta which clearly ask for liability reform and oppose administration's approach. $8 billion in additional resources will be bled from communities and businesses with no assurances to this committee, who is going to impose that requirement, that there are new developments or actual cleanups. So, at best, the EIRF might be a new and improved, expensive process and, at worst, a new problem.

If this committee is going to raise $8 billion in new taxes, please raise it for the right reasons. Raise it for the actual cleanups to get people involved, communities experts and scientists, not more EPA bureaucrats or lawyers.

Liability reform is the key. It is the solution to the problem. Please consider that when you proceed.

Thank you.

Mr. PICKLE. Thank you.

[The prepared statement follows:]

TESTIMONY OF JOHN F. SPISAK
INDUSTRIAL COMPLIANCE, INC.

Chairman Gibbons and members of the Committee, I am John F. Spisak, President and Chief Executive Officer of Industrial Compliance, Inc. I am a chemist and biologist by professional training.

Industrial Compliance is a national environmental engineering and consulting firm headquartered in Golden, Colorado with nine operating offices throughout the Western and Southern states.[1/] Industrial Compliance specializes in the full range of technical and regulatory compliance and remediation issues arising from the panoply of federal and state environmental requirements involving air, water and soil media. Of particular interest for the hearing today, Industrial Compliance has a wealth of experience with the federal Superfund program and we are well aware of the program's chronic defects. Indeed, it was this experience that lead me to prepare a comprehensive proposal for Superfund reform, called the "Fresh Start" proposal which directly addresses the serious liability, funding and incentive flaws which, unless comprehensively redressed by Congress, will continue to make the program litigious, wasteful and ultimately unproductive to our society.

In the context of those efforts, I joined in full support of Dr. Benjamin Chavis and the Alliance for a Superfund Action Partnership's (ASAP) Eight Point Plan for the comprehensive reform of Superfund. In that same ASAP context, I fully support the testimony of Dr. Chavis' representative, Larry Wallace and that of Maurice Greenberg, Chairman of American International Group, who testified on the earlier panel.

We are before this Committee, because H.R. 3800 reauthorizes the existing taxes of Superfund, as well as creates a major new tax on the insurance industry to fund the Environmental Insurance Resolution Fund ("EIRF").

From my perspective as an environmental professional working on Superfund remediations since the inception of the program 14 years ago, I see the process up close and, from that proximity, I see how federal and private sector money is spent. I see first hand how the punitive and legalistic retroactive liability regime runs up costs needlessly as PRPs fight EPA every step of the way in the process. Instead of being a true "polluter pays" system, in reality, Superfund is a "deep pocket pays" system. The net effect is to punish profitable companies for past activities which were, for the most part, lawful and generally acceptable industry practice at the time. And who, in reality, bears these costs imposed on the "deep pocket" company? The company's owners, the millions of individuals and corporate investors including pension funds of the employed and the retired, college endowments, and the portfolios of churches and even environmental groups. Superfund's current retroactive liability scheme gives EPA carte blanche to impose billions of dollars in invisible taxes on your constituents wholly outside the federal budget and without coming before this Committee for approval.

This Committee should understand that EPA's "taxing" ability is unique among government agencies. As opposed to agencies like Interior or HHS, whose regulatory burdens fall like a blanket across all businesses or major regions of the country, EPA can selectively and discriminatorily levy its punitive liability tax on any business or industry it chooses at any time. No planning or preparation is possible. The only option is litigation.

The protracted punitive pursuit of American industry under Superfund also has substantial adverse impacts on American consumers and our economy. The billions of dollars in Superfund litigation costs -- as well as any ultimate clean up expenses --

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1/ Industrial Compliance has offices in Dallas and Houston, Texas; Knoxville, Tennessee; Little Rock, Arkansas; Monterey Park and Sacramento, California; Overland Park, Kansas; Phoenix, Arizona; and New Orleans, Louisiana.

incurred by American industry are passed along to consumers in the cost of goods and services and in reduced jobs and economic investment. In effect, consumers too are already paying this enormous and invisible Superfund "tax" buried in the price of goods and services, higher unemployment and reduced economic competitiveness which totals billions of dollars each year.

Until Superfund is changed, these invisible "off-budget" taxes will continue indefinitely. Moreover, the huge financial resources dedicated by American industry to fighting the stark inequities of Superfund are diverted from far more socially productive enterprises such as research and development of new products, investment in capital goods or facility expansion, and increased employment, all of which could lead to enhanced economic welfare of the Nation.

I. Congress Should Not Extend the Existing Superfund Taxes, Nor Add New Taxes for the EIRF, Unless The Core Problem of Retroactive Liability is Directly Resolved.

It would be irresponsible for Congress to reauthorize the existing billions of dollars in Superfund taxes, much less add billions more, to perpetuate Superfund's disgracefully wasteful and unproductive record over the last 14 years -- yet that is precisely what H.R. 3800 would have you do. This Committee should use the leverage it has over the program's tax authorization to insist on comprehensive, structural reform that addresses not just the symptoms of the disease but eliminates the actual root cause of Superfund's problems -- that is, retroactive liability.

II. The EIRF Will Not Ameliorate the Waste and Inefficiency of Superfund.

The basic flaw of the EIRF proposal is that it takes a discrete and derivative liability dispute -- the one between PRPs and insurers -- and attempts to resolve it in isolation from all other liability-related issues. EIRF is not designed to eliminate the underlying cause of the Superfund liability warfare which causes suits against insurers in the first place. Rather, it seeks only to eliminate one of the symptoms.

- The EIRF provides no additional money for public health and cleanup. The hundreds of millions of dollars in new taxes on insurers to fund the EIRF will be used only to reduce the existing liability and past expenses of solvent PRPs. Worse, the new tax revenue will pay for past PRP costs, including PRP legal fees dating back to 1981.

- Yet the fund is virtually unlimited. It can borrow against future revenues, and it has a perpetual life until it has spent all amounts it owes for any PRP claims for any current or future NPL site, if the site was noticed before 10 years after passage. (Sec. 803).

- The EIRF may well provide incentives for more disputes. Whether or not they settle with EPA on remedies to clean up sites, or with other PRPs and EPA on cost allocation, PRPs will have an average of 40% of their future legal bills paid by EIRF within 60 days of submission to the Fund. This subsidy of PRP legal fees will fuel the PRP side of the battles between the government and PRPs at sites. (Sec. 806)

- The transaction cost savings due to EIRF are vastly overstated. A recent RAND report on transaction costs found that only 1% of PRP costs were for disputes with their insurers (a tiny fraction of the 35% PRPs spend on overall transaction costs).

- Insurers' transaction costs are much higher than PRPs. However, 60-70% of insurers' toxic waste costs are due to non-NPL sites, which are usually mixed in with NPL sites in PRP suits against insurers. In these common cases, resolving NPL liability will not stop the lawsuits.

- By requiring proof of policy terms (even if the policies can't be found), and limiting recovery by any deductibles in them, the EIRF will create a new federal claims bureaucracy to deal with factual arguments over policies stretching back decades, and spawn a subculture of lawyers and lobbyists to address each substantial claim. (Sec. 806)

- The "trigger" to activate the EIRF contains enormous loopholes that allow PRPs to forum shop (EIRF or litigation) for the best deal.

As drafted, if 15% of the "eligible persons" (PRPs who have filed suit against their insurers) expressly elect not to participate in the EIRF, the whole system is dismantled. Query, what other tax has this Committee enacted which was subject to a plebiscite of affected taxpayers before it went into effect?

Moreover, if less than 15% elect not to participate, it does not ensure that the remaining 85-plus percent will participate and not file suit against their insurers. Only those eligible parties who expressly accept the determination of applicable percentages are bound to participate in the EIRF.

Those who do not file a request or who file but do not respond are deemed to have accepted the percentages offer, but only for purposes of determining if the minimum participation level has been met. They are not bound to settle with the EIRF. Furthermore, parties who have not yet filed suit against their insurer are not bound. These categories of eligible parties can choose either to file suit or to pursue settlement through the EIRF, depending upon which works best to their advantage. (Sec. 806) So where have you reduced litigation in the EIRF?

III. The EIRF Is No Friend Of Small Business.

The proposed EIRF was negotiated by a small group of large PRPs and large insurers; understandably it reflects their interests. It has little to do with ameliorating the negative impact of Superfund on small businesses and, in fact, includes provisions that are financially lethal to small business owners. For example:

- EIRF claimants must present considerable evidence of the specific terms of insurance coverage to be eligible for EIRF payments. Documentation of at least six policy periods seems to be required: the dates of coverage, the deductible and the amounts of coverage (Sec. 805 (d)).

- It will undoubtedly be difficult for many small businesses to produce their insurance policies that end in 1985 and go back 10 years or more before that, or to establish the essential terms of these policies by some other means.

- The EIRF provisions appear to require the EIRF to exclude from coverage companies which have been notified as a PRP either by the government or other PRPs but have not sued their insurer, or have taken other actions to pursue claims in the last year [Sec. 805(a) & 805(b)]. These provisions were explicitly designed to exclude many small businesses, even if they sent notice to their insurer of a potential claim in the past.

- There are thousands of current smaller PRPs which were notified by EPA or big PRPs (but have not been pursued by them -- as yet), who have incurred the economic damage of having received such notice, but have no role in the process and so do not pursue their insurers until EPA and the big PRPs work out the remedy - at which point claims are made on them. These are the parties which EIRF seeks to exclude from coverage.

- Contrast this exclusionary treatment with the EIRF policy negotiated by the big PRPs and some few insurers to even reimburse a percentage of past and future PRP legal fees, whether paid by PRPs or insurers on their behalf.

- The bill limits the right of parties to challenge EIRF decisions. This will be especially harsh for small businesses, who are much less able to prove policy specifics than large companies.

IV. ASAP's "Eight Point Plan" is Reform Worthy of Enactment.

ASAP's Eight Point Plan directly resolves the threshold crippling problem caused by retroactive liability by eliminating such liability for many sites prior to 1987. The Eight Point Plan can do that since it includes a funding scheme that is both fair and adequate and, thus, allows retroactive liability to be supplanted. No longer will there be litigation over who was at fault, who should pay, how expensive should the remedy be, how clean should the site be. Instead the money spent in Superfund will be applied to actual site cleanup, speeding remediation at more and more sites across the nation.

The nearly $1.1 billion that ASAP's Eight Point Plan raises annually above existing Superfund tax levels that H.R. 3800 asks you to reauthorize, goes directly for clean-up, a solid return for the tax dollar. Please note that in contrast, the EIRF's $800 million annual tax increase is a pig-in-the-poke with no assurance or mandates for clean up.

ASAP's fair and broad-based fund derives its resources from not only the insurance industry, but also from large and small businesses that benefit from removal of retroactive liability. Specifically, ASAP proposes up to a doubling of the existing Environmental Income Tax (EIT), a concept which has been accepted as policy by the Business Round Table (BRT) as a trade for retroactive liability reform. ASAP, like H.R. 3800, calls for an assessment on the insurance industry, but unlike H.R. 3800, that money would fund clean ups directly, not feed lawyers and litigants. Additionally, ASAP would assess small quantity generators of hazardous waste a small and fair fee to raise the final component of the fund and thus remove their liability. This broad-based funding concept has been endorsed by the U.S. Chamber of Commerce's Small Business Council and by large numbers of small businesses throughout America, many of which are National Federation of Independent Businesses ("NFIB") members and who oppose NFIB's position on H.R. 3800.

Unlike H.R. 3800, ASAP's plan seeks to avoid special interest carve-outs and favors within Superfund. Under ASAP, everyone pays a fair share without trying to gain advantage under a revised status quo system.

The highly touted Superfund consensus of this Administration is easy to understand, as it represents a panoply of groups who gain relief or advantage under existing law. Unfortunately, as exemplified by their EIRF, it is at the expense of others with no improvement in clean ups.

Besides being special interest neutral, ASAP's funding plan brings the majority of all Superfund expenditures under the trust fund umbrella. That forces EPA, like any normal business and most government agencies, to actually prioritize and budget as well as be accountable (to this Congress) for its activities. ASAP's plan, by removing the current liability scheme and adding broad-based funding not significantly higher than what is proposed in H.R. 3800, will bring budget discipline and accountability to this agency for the first time in 14 years. With apologies to my friends at the Department of Defense, they may spend $617 on a hammer, but at least their action is a line item in a budget that was reviewed and approved by someone who has to answer to the Congress as to why it was spent. In contrast, with Superfund, a PRP is simply told by EPA to spend the PRPs own money or else face fines and treble damages. For the first several years, the PRP's money goes to developing and finding additional PRPs and building a data base to fight EPA. My clients know EPA can impose liability and force huge expenditures. Is it any wonder PRP's choose to fight and delay?

Conclusion

If this Committee has summoned the courage to increase taxes, which H.R. 3800 already commits you to doing in a big way, I urge you to reject the H.R. 3800 and its EIRF. Instead, you should insist that before you extend or raise another cent of taxes for Superfund, Congress must add comprehensive liability reform and broad-based, fair funding in order to create a solid bill that will indeed speed clean ups, protect health and give this Committee and the nation's taxpayers their money's worth.

Thank you Mr. Chairman.

Mr. PICKLE. Now we will hear from Mr. Miller, owner of Miller Dry Cleaning, Tallahassee, Fla.

STATEMENT OF RICHARD MILLER, OWNER, MILLER DRY CLEANING, TALLAHASSEE, FLA., ON BEHALF OF THE DRY-CLEANERS ENVIRONMENTAL LEGISLATIVE FUND

Mr. MILLER. Thank you, Mr. Chairman and committee. I appreciate the time.

I am Rick Miller. I am from Fort Lauderdale, Fla., a little further south.

I am here speaking on behalf of 30,000 drycleaning establishments, mostly neighborhood cleaners from around the country that belong to such associations as the International Fabricare Institute, the Neighborhood Cleaners Association, the Federation of Korean Drycleaning Associations, et cetera.

Two weeks ago, we had a meeting in Chicago where we had about 300 people that covered all these associations. Most every State was there, and they all embraced the amendment that we are introducing here.

Personally, I operate a single plant facility in Fort Lauderdale, Fla. I would like to tell you a story that is pretty personal.

I have a 75-year-old mom and dad, and he has a 75-year-old partner, and his wife and I had gathered them together in 1991 and told them that if we were ever asked to check the ground underneath our particular plant that they would have one of two choices. One would be to gather all their assets, give them to this government entity and figure out a way to support themselves for the rest of their days at 75 years old. Or the other alternative was to gather all their assets and move out of these United States of America.

That was tough. But it was the only two choices that they have. After a lot of arguing and mainly about the fact, hey, Rick, I did everything to the letter of the law, and we were at the head of the drycleaning industry as far as following the law, they finally accepted it and asked me what could be done, and I said at this time nothing. But I guess that is one of the reasons I am speaking here and why we did what we did in Florida.

H.R. 3800 has little impact on the drycleaning industry in the United States, and, therefore, we are not asking to change the bill but to add language that we have enclosed to this bill.

Most drycleaners are using perchloroethylene, perc. Over the years, perc has entered the soil and groundwater of many drycleaning sites through sewers and trash disposal methods that have been consistent with Federal regulatory standards. This low-level contamination rarely if ever rises to a level of concern for EPA or State responses, although, in Florida, my home State, we have 200 out of 2,000 cleaners that have been cited, and in a certain area in the panhandle from Tallahassee to Pensacola we have 32 out of 100 plants for that area that have been cited. And all of those people are not sleeping real good every night, I promise you.

Drycleaners, nevertheless, face the increasing threat of action from landlords and neighboring property owners who wish to sell or refinance their property. For the great majority of these dry-

cleaners, a forced cleanup or litigation means certain business failure.

The average drycleaning plant is worth between $200,000 and $300,000. The average cleanup is probably $250,000 to $500,000 or more. And the choice is turn over your assets or gather your assets and walk—that is the only two things they have—and figure out another way to live.

To address this difficult predicament, a number of drycleaning associations have worked together to propose a solution that, while imposing significant individual sacrifice, will hopefully offer a high level of business security and hope for survival of this important industry.

The Drycleaning Industry Superfund Coalition Amendments, which we have attached to the statement, would establish an industry-financed drycleaner environmental response fund and mandatory pollution prevention measures for all drycleaners. That would eliminate any further contamination.

Mr. MILLER. In return for this, the industry's major financial and environmental commitment, drycleaners seek relief from private parties or State government. We emphasize that this does not eliminate drycleaner liability for a facility listed or proposed for listing on a National Priority List or if EPA decides to make action.

Specifically, the proposed amendments would establish a $1 billion Drycleaners Response Fund financed through environmental fees at drycleaning facilities and on the sale or use of drycleaning solvent. A projected income of $100 million a year for 10 years would go a long way toward addressing cleanup at the most serious locations in the United States.

This is a significant financial commitment on the part of tens of thousands of small business owners, and I speak for the drycleaning industry to say that we are prepared to make this financial sacrifice to be sure of the future of our livelihood and our industry.

Contrary to the belief of some who see these amendments as overly complex and unnecessary in the light of existing or proposed voluntary cleanup provisions, several States have moved forward, namely Florida, whose law becomes effective July 1, 1994, and is effective now, that establishes a State program to address and clean up contamination of Florida's many 2,000 operating and abandoned drycleaning facilities.

As with the legislation we are discussing today, the Florida law imposes a new environmental fee on the drycleaning industry to finance the cleanup of facilities that will be selected from the registry of all the drycleaning sites in the State. We have attached a record of that and a program summary. I was deeply involved in that. I will tell you it is embraced by the entire drycleaning industry. I personally don't know of one drycleaner that was against this bill in the entire State.

Mr. MILLER. And, in addition to this, just last Thursday we had an environmental engineer come to DEP and introduce a new way to clean up our problem. And I think this is what could happen if we look at a bill similar to this nationally.

Most drycleaners are doing everything possible above the ground in their plant to make sure that there is no more contamination, praying that no one asks them to check the ground and hoping that

we can convince you people to add this language to H.R. 3800 to immediately start the ground checks and cleanups and—if necessary—without the reprisal of losing everything they have worked for all their lives and putting their employees on the welfare lines and get this matter cleaned up.

IFI, NCA and other associations would like to stress the commitment that our industry has made to becoming part of this solution. We are not asking for a free pass, just a workable program to address our unique problem.

Thank you very much for your time.

Acting Chairman GIBBONS. Thank you, Mr. Miller. That was a very constructive statement that you made there.

[The prepared statement follows, and the attachments referred to will be retained in the committee files:]

STATEMENT OF RICK MILLER
DRYCLEANERS ENVIRONMENTAL LEGISLATIVE FUND

Good afternoon. My name is Rick Miller and I am a drycleaner from Ft. Lauderdale, Florida. I am here today on behalf of the Drycleaners Environmental Legislative Fund (DELF), an organization representing most of the nation's nearly 30,000 neighborhood drycleaners, and am pleased to have this opportunity to testify on H.R. 3800, the Superfund Reform Act of 1994. DELF is composed of drycleaners from the International Fabricare Institute (IFI), the Neighborhood Cleaners Association (NCA), the Federation of Korean Drycleaning Associations (FKDA), and the Fabricare Legislative and Regulatory Education organization (FLARE). IFI is made up of roughly 8,000 drycleaners having approximately 13,000 facilities while NCA and the FKDA consist of approximately 4000 and 8000 drycleaners, respectively. FLARE is the industry's grassroots legislative group and is composed of numerous members from the other drycleaning associations. I am a member of both IFI and NCA.

I appear today on behalf of the drycleaning industry to talk about a problem and a solution that departs from the traditional approach to liability at NPL sites. Indeed, drycleaners are little affected by NPL sites; H.R. 3800 has minimal impact on the drycleaners' problem. Thus, we are proposing an addition to H.R. 3800 and are not suggesting that anything in the existing bill be changed. With the addition of our language, the drycleaning industry would support H.R. 3800.

By way of background, most drycleaners utilize a drycleaning solvent called perchloroethylene, which is commonly referred to as "perc." Over the years, perc has entered soils and groundwater at many drycleaning sites through sewage and trash disposal methods that have been consistent with relevant regulatory standards. Although this low-level contamination rarely, if ever, rises to a level of concern for EPA or state response agencies, drycleaners nevertheless face the increasing threat of legal action from landlords and neighboring property owners who wish to sell or refinance their property. For the great majority of these drycleaners, who collect extremely modest yearly receipts, a forced clean-up and/or litigation means certain business failure.

To address this difficult predicament, a number of drycleaning associations have worked together to propose a legislative solution that, while imposing significant individual sacrifice, will hopefully offer a high level of business security and hope for survival of this important industry. The Drycleaning Industry Superfund Coalition Amendments, which we have attached to this statement, would establish an industry-financed drycleaner environmental response fund and mandatory enhanced pollution prevention measures for all drycleaners. In return for the industry's major financial and environmental commitments, drycleaners seek relief from liability to private parties or state government as owners/operators under Section 107 of CERCLA. We emphasize that this proposal does <u>not</u> eliminate drycleaner liability at a facility listed or proposed for listing at a National Priority List site or if EPA decides to take action.

Specifically, the proposed amendments would establish a $1 billion Drycleaners Environmental Response Fund that would be financed through new taxes on all active drycleaning facilities and on the sale or use of drycleaning solvent. Projected revenues of $100 million a year for ten years would go a long way towards addressing clean-up at the most serious drycleaning locations throughout the country. To reach this funding level, each drycleaning facility, on average, will contribute roughly $3300 per year. Needless to say, this figure represents a significant financial commitment on the part of tens of thousands of small business owners.

This committee is obviously concerned about any legislation that would mean new taxes. I believe that I speak for the great majority of the drycleaning industry in saying that we are prepared to make this financial sacrifice to ensure the future livelihood of our industry.

Contrary to the belief of some who may see these amendments as overly complex or unnecessary in light of existing or proposed voluntary clean-up provisions, several states have already moved forward to enact legislative proposals to address the unique problems faced by the drycleaning industry. Most notably, the state of Florida passed legislation, effective July 1, 1994, that establishes a state program to address and clean up contamination at many of Florida's 2000 operating drycleaning facilities. As with the legislation we are discussing today, the Florida law imposes new taxes on the drycleaning industry to finance the clean-up of facilities that will be selected from a registry of all drycleaning operations in the state. We have attached for the record a copy of the Florida legislation and a program summary.

In conclusion, we would like to stress the commitment our industry has made to becoming part of the solution to our nation's serious environmental concerns. As is evident from the proposed legislative program, drycleaners are not asking for a free pass from environmental liability. Drycleaners simply seek a workable program to address our industry's unique problems.

Acting Chairman GIBBONS. Mr. Pickle.

Mr. PICKLE. Mr. Howard and Mr. Crimmins represent two industries that have made a very sizable contribution, paying taxes to this program for the past 10 or 12 years. And you both have testified that you think it ought to be continued. You don't want any new taxes but at least the program ought to go forward. Am I interpreting both of you correctly?

Mr. HOWARD. We think H.R. 3800 is a good first step. We think reauthorization ought to go forward. But we think that there are a number of problems that need to be resolved with this bill.

Mr. PICKLE. Mr. Crimmins, you are pretty much the same?

Mr. CRIMMINS. We support the bill, Mr. Pickle.

Mr. PICKLE. Mr. Spisak, you very much are against the bill and even made some negative statements about the program. If we don't go forward with H.R. 3800, what do you do? What do you recommend?

Mr. SPISAK. Mr. Pickle, I think my comments, as well as many others before me today, have made it clear that all this struggling that we are engaged in is the result of the liability provisions of Superfund. It has been the source and the core of the problem for over a decade.

If this Congress would wrestle with that issue of retroactive liability—and we have heard many of the proponents of H.R. 3800 say that the ultimate problem is the liability. If we deal with that issue—and it certainly can be dealt with in this Congress.

Many businesses have come forward and offered to pay a broad-based tax. You have heard from many different industries on all the panels today all saying they support additional taxes to make this work.

There is a strong feeling that it is not politically viable to deal with the liability issue because it is so thorny, because there is no much emotionalism attached to it over the last 14 years. If it is dealt with and the broad-based taxes are imposed that cover all industries all of this wrangling and wrestling goes away, all of this goes away.

Mr. PICKLE. If we just get rid of the liability.

Mr. SPISAK. If we get rid of the liability and replace it with a broad-based fund, the program stays solvent, Superfund remains and the sites are cleaned up faster and much more effectively.

I can tell you from the efforts in my business the amount of time and professional effort that is spent in supporting litigation. We do studies and take samples to determine who did what and where this material was deposited. All of that goes away. And we can get about the business of repairing and cleaning up these sites.

Mr. PICKLE. Well, that is another viewpoint, and I think it is a minority viewpoint, but you are certainly entitled to make that statement.

Mr. Chairman, I don't think I have any other questions about this panel.

Acting Chairman GIBBONS. Mr. Houghton.

Mr. HOUGHTON. I have got several specific questions, but let me, if I could, just share with you a couple of generalizations which I have gathered from your testimony and the testimony of others. It

sounds simplistic, but I would like to go over them to see if you agree or disagree.

We have a problem. It costs us a lot of money. We haven't done it particularly well. We want to have a new approach to this thing. Laws are wrong. It is unfair to decent people who have tried to do what they have done in the past and yet all of a sudden find themselves with this almost impossible liability hanging around their necks.

Taxes should only go to clean up, not pay for disputes between insurance companies and clients. The burden should fall on those who have been or will potentially be involved in the cleanup-type activities.

There can be a balance between the retro and prospective liabilities. However, the emphasis should be on the results rather than the process. In other words, somehow, some way, the ineptitude, and the pace of cleanups and costs have got to be somehow resolved in this process.

Now, I don't know whether you agree or disagree with that. I am trying to create a basis upon which we can move to the next stage. Do any of you have any comments? If not, let me just go on here.

Mr. Howard, in your statement you indicate that more funding for cleanups should be provided through general revenues or broad-based taxes. You also indicate that the petroleum industry has paid a greater portion of the Superfund taxes than other industries. So what tax would the API suggest in lieu of the current excise taxes?

Mr. HOWARD. Our position is—and I think Congress addressed it earlier when it instituted the CET, for instance—that, as a result of those direct taxes on our industry, we have been carrying the 60 percent burden around since Superfund was instituted, and we think that is unfair to burden our industry and our customers with that kind of cost.

The CET would be an alternative to expanding the tax base and spreading the responsibility to businesses, both large and small, as well as governmental agencies, all of which—State, local, and Federal—all of which have contributed to the problem.

Mr. HOUGHTON. OK. Mr. Spisak, I have got a question for you. You evidently have got a lot of experience in the actual cleanup of contamination sites. We have not talked about that. You say that the process is not good, and we ought to get to the results and try to find a solution. But if you could share one or two thoughts, what would you recommend in terms of the actual cleanup?

Mr. SPISAK. Clearly, when we discover a site that is impacting people, especially one that close to a neighborhood that it is destroying the ability of that community to redevelop and threatening the health of those folks, we should not be focusing our time on who put the chemicals there and when they put them there and how to sort out and allocate in that process. Because, if we do, these things continue to move underground. The dust continues to be breathed by these folks.

Just because Congress or the courts engage in a protracted process doesn't mean that these chemicals stop in their tracks and wait for that process to end. As a firm who goes in and tries to design and engineer solutions, we need to put that talent to work from the very beginning, from the time that site is discovered, and not wait

until 2 or 3 years once the parties have settled their differences and there has been a protracted argument with EPA over who does what. That has been the problem for 14 years, and that is the problem that we see continuing.

Mr. HOUGHTON. So you think we should pay now and settle later?

Mr. SPISAK. That is the purpose of eliminating retroactive liability and setting up a fund that is adequate to take care of these sites.

Mr. HOUGHTON. Do you think the cleanup process is appropriate? It seems we spend a lot of time talking about legal issues, money issues, and liability issues, but we need to focus on actual cleanup. Are we approaching these cleanups the right way?

Mr. SPISAK. In some cases, we are. In some cases, we are not. There are inconsistencies from EPA region to EPA region.

As you know, in H.R. 3800 there has been a lot of discussion about trying to deal with remedy selection processes: how clean is clean, future land use issues. All of those have to be corrected to improve the process.

But, clearly, the legal process at the front end has delayed these site cleanups for a very long time and has wasted a large amount of money.

Mr. HOUGHTON. I am finished, Mr. Chairman. Thank you.

Acting Chairman GIBBONS. Mr. Cardin.

Mr. CARDIN. No questions.

Acting Chairman GIBBONS. Mrs. Johnson.

Mrs. JOHNSON. Mr. Spisak, you have had more experience than the ordinary person with the complexity of this process and the enormous injustice of it on the ground and yet the process is focused at this point only on the primary Superfund sites. In your experience, what is going to be the economic impact as we move away from the big sort of municipal disposal sites and a couple of big hot spots, primarily company-owned and operated, and get into this kind of issue in urban areas?

The implications, it seems to me, for economic redevelopment in the cities are very great and has been one of the reasons why more economic development hasn't gone on in the cities. From your perspective, are you seeing that?

Mr. SPISAK. Yes, that is exactly right. As long as retroactive liability hangs out there, there is a real abhorrence on the part of developers or prospective purchasers to involve themselves in a site.

We have heard that the banking industry needs protection, and under H.R. 3800 it is given some protection because it doesn't want to assume liability for a site. Yet what is not addressed is the fact that a private business, a chemical company or an industrial company who involves itself in a site and that site threatens its financial viability is going to have the same problems in obtaining loans or financing for its future as a company who clearly would pull its bank into liability. Lenders don't like to lend money to people who could prospectively go bankrupt, and that is one of the key issues.

Mrs. JOHNSON. It appears to me because of the cities—this certainly is true in New England—the cities were the sites of old man-

ufacturing. It was done in my home town not far from the core of the city and the city green.

And one of the problems that we are running into when the old manufacturers, frankly, die is that people who want to use that property to redevelop it or to create new jobs back off because of the Superfund possibilities. And banks won't give them the credit anyway. So, increasingly, I see New England towns left with the inability to draw jobs into the cities, and we are going to see a hollowing out of the mid-sized cities just like we have seen a hollowing out of the big cities.

And Superfund liability is already one of the big driving forces. We just don't see it because we are so preoccupied with the municipal disposal sites.

Mr. SPISAK. You are exactly correct, and that problem is not solved under H.R. 3800. It is just not fixed.

Mrs. JOHNSON. It is my understanding that that is why the NAACP is so interested in this issue. You can't rebuild the cities unless you bring jobs in, and you can't bring jobs in if the land carries with it potential liability.

Mr. SPISAK. And for underprivileged and minority communities the jobs that are going to allow them to move into the middle-class are not the minimum wage, service sector jobs but the higher paying, industrial skilled and semiskilled jobs which will not grow and will not evolve unless this liability issue is addressed.

Mrs. JOHNSON. One of the reasons I am so keen on repealing retroactive liability is that I think the city's future is bleak, and now we are getting down to the mid-sized cities, 30,000 to 50,000, that are being destroyed by this.

Thank you.

Acting Chairman GIBBONS. I thank all of you for coming and helping us with this problem. We appreciate it. Thank you.

[Whereupon, at 3:39, the hearing was adjourned.]

[Submissions for the record follow:]

TESTIMONY OF ASSOCIATION OF BRITISH INSURERS, INSTITUTE OF LONDON UNDERWRITERS, AND ASSOCIAZIONE NAZIONALE FRA LE IMPRESE ASSICURATRICI (ANIA)

I. Organizations Presenting Statement

This statement is submitted on behalf of the Association of British Insurers and the Institute of London Underwriters.[1] The Association of British Insurers ("ABI") is the main trade association of insurance companies in the U.K., and represents more than 450 U.K. insurance companies which write both insurance and reinsurance for both property/casualty and life risks. Together these companies (excluding their overseas subsidiaries) write 90% of the premiums written by U.K. insurance companies, and nearly 70% of all insurance premiums written in the U.K. (the remainder of premiums written in the U.K. are written by syndicates at Lloyd's of London and non-member companies).

The Institute of London Underwriters ("ILU") is a trade association for 70 London-based companies which underwrite marine, aviation and transportation risks, including both insurance and reinsurance. ILU members also write a substantial volume of energy business, including the insurance of oil rigs and pipelines, and "inland marine" business, such as large transport industry installations. The ILU is a self-regulatory organization with high standards for solvency. In 1993, ILU members wrote over £2.4 billion (approximately $3.6 billion) total net premiums from both U.S. and non-U.S. sources. Approximately one-third of the coverage written by ILU members covers U.S. policyholders.

Associazione Nazionale fra le Imprese Assicuratrici (ANIA) represents insurance companies which write life and property-casualty insurance, both direct insurance and reinsurance. Italian insurance companies provide reinsurance directly to the U.S. market as non-admitted companies, as well as primary insurance on a surplus lines basis.

II. The London Market

The "London Market" is a term that identifies the distinctive market that conducts an international insurance and reinsurance business. The business is almost exclusively property-casualty insurance and reinsurance with an increasing emphasis on high-exposure risks. It is largely a "subscription market" in which insurance and reinsurance are placed by brokers with two or more insurers or reinsurers who subscribe to a "slip" prepared by the broker describing the risk insured. The underwriters are insurance companies as well as syndicates at Lloyd's. The London Market is renowned for its coverage of novel and hard-to-place risks, and provides essential coverage for major U.S. airlines, shipping, and the oil and chemical industries.

A key feature of the London Market business is the wide distribution of the sources of its international business. It is often impossible to determine the geographic origins of marine, aviation and transport ("MAT") and non-Marine treaty reinsurance business, since it may be generated in more than one country. "Home-Foreign insurance" and facultative reinsurance may also include risks in more than one country, especially where they are arranged for multi-national corporations. The only geographic breakdown of the companies' London Market premiums is that provided by the LIRMA annual surveys of business written in London by their members. In 1992, it is estimated that the London Market wrote total gross premiums for all lines of approximately £17.9 billion ($26.8 billion).[2] Approximately 25% of this was estimated

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[1] This material is issued and circulated by Hopkins & Sutter, 888 16th Street, N.W., Washington, D.C. 20006, which is registered under the Foreign Agents Registration Act as an agent of the Association of British Insurers, the Institute of London Underwriters, and Associazione Nazionale fra le Imprese Assicuratrici. This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

[2] Source: The London Insurance Market: Issues and Responses, a Report prepared by Robert L. Carter and Peter Falush, published by the Association of British Insurers, the Institute of London Underwriters, and the London Insurance and Reinsurance Market Association.

to be U.S. business ($6.7 billion), divided roughly equally between reinsurance and direct insurance[3].

III. Brief description of the Proposed Taxes to Fund EIRF under H.R. 3800

Two Taxes on All Insurers: The environmental insurance settlement fund is to be financed by two taxes collected from insurers: a retrospective fee which is intended to provide 70% of the funding, and a prospective fee which will provide 30%.

The ***retrospective tax*** would be computed by multiplying net premiums for the 15 year period (1971-85) for commercial lines providing environmental coverage by a rate of 0.20% for the first two years, to increase to 0.27% for the next three years. Instead of the retrospective fee, there would be an ***alternate tax on foreign insurers*** based on the aggregate limits of liability for new commercial policies, multiplied by a rate of 0.50%.

In addition, all insurers would be subject to a ***prospective tax*** of 0.34% of gross premiums for commercial insurance, including "commercial multi-peril", "fire", and "other liability" lines, but exclusive of coverage unrelated to environmental liability (such as medical malpractice or brokers' errors and omissions) that may be reported on those lines. The rate of 0.34% for the first two years would increase to 0.44% for the next three years.

IV. Comments about the Current H.R. 3800 Proposal for Taxes to Fund the EIRF

The ABI and the ILU support the Environmental Insurance Settlement Fund ("EIRF") and the Superfund Reauthorization Bill (H.R. 3800). Their members do not dispute the principle that foreign insurers should pay some "fair share" of the taxes funding settlement payments. At the same time, they are concerned that any tax imposed solely upon foreign insurers be fair and non-discriminatory.

Taxes upon Foreign Companies: All companies, domestic and foreign, would pay the prospective tax. However, in lieu of the retrospective tax, foreign companies would be subject to an alternate tax, proposed in order to avoid violating treaty waivers of the federal excise tax on insurance under §4371. The alternate tax would be imposed as a percentage of the aggregate limits of liability in new policies written in covered lines of business. Foreign companies may elect to pay the retrospective tax rather than the alternate tax. In fact, the alternate tax is so harsh that it has been characterized as an incentive for foreign companies to elect the retrospective tax. If foreign companies elect the retrospective tax, Treasury's concerns about equity among similarly situated taxpayers will be satisfied, and it will have achieved its policy goals without violating treaty waivers of the federal excise tax.

A. Adequate Records Are Not Available to Permit an Election to Pay the Retrospective Tax

In the base period for the retrospective tax, British insurers provided financial statements to the Department of Trade and Industry that divided premiums into several lines of business, but these annual financial statements did not source them by country of origin. Discussions with the Tax Panel of the Association of British Insurers have disclosed that the majority of British companies have only very limited work papers or other records available for the years 1971-85 (the base period for the retrospective tax) which would permit them to separate U.S. business from all other coverages reported on that line of business. In addition, there is little detail available for separating coverages subject to the retrospective tax from coverages reported on the same line of the U.K. financial statement that contained no environmental liability, such as medical malpractice or broker's errors and omissions. If supporting work papers are available at all, it would be very costly and time consuming to retrieve them and conduct any examination. In short, the administrative costs of determining the liability for the

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[3] Source: Operation and Regulation of the London Insurance Market, prepared by the London Insurance and Reinsurance Market Association, 1992.

retrospective tax are so great that, as a practical matter, the majority of British insurers have no choice but to pay the alternate tax on aggregate limits of liability.

If foreign insurers are to have a real option to elect to pay the retrospective tax, the statute should be amended so that the IRS would accept "reasonable approximations" of the U.S. premiums for affected lines of business. The IRS should also be directed to consider the cost, time, availability, and administrative burden required to determine taxable U.S. premiums for the retrospective tax. The incorporation of a "reasonable approximation" standard for review by the IRS is crucial to granting foreign insurers' an option to pay the retrospective tax.

B. The alternate tax on policy limits should be subject to a limitation to prevent discrimination against foreign insurers.

The alternate tax rate is confiscatory when applied to catastrophe reinsurance premiums. In comparing the rate of the alternate tax to the premiums charged for high levels of reinsurance (commonly referred to as catastrophe reinsurance), ABI and ILU members have found that the tax rate may exceed the premium charged. For example, London underwriters have advised us that a U.S. energy company seeking coverage of $50 million in excess of the first $50 million would pay a premium of $100,000. The alternate tax for this coverage would be $250,000 --- more than double the premium. The effect of this harsh tax would be to force foreign reinsurers to increase the rates for high layers by more than 200 per cent in some cases. If market conditions permit companies to pass along the increase, U.S. companies would face enormous increases. If it is not possible to increase premiums, the alternate tax would result in a reduction of the reinsurance capacity available to U.S. companies.

The burden of the alternate tax falls more heavily upon reinsurance than primary insurance, since the aggregate limits for reinsurance are typically much higher than for primary insurance. There is no sound policy reason to impose a burdensome tax upon foreign reinsurance.

The effect of the alternate tax is clearly contrary to good tax policy. High layers of reinsurance serve to distribute the risk that a catastrophic event, such as Hurricane Andrew, will cause a single company to become insolvent. Shifting the risk of loss from such concentrated geographic losses also protects the U.S. economy against the most severe impact of such natural disasters. There are sound economic reasons to permit high layers of reinsurance to be purchased abroad. A tax should not cause a dramatic rate increase, or even serve as an incentive to retain such risks within the U.S.. We urge the Committee to revise this tax so that it is limited to 1 per cent of the premium. This limit would ensure that it does not have an adverse impact upon the premiums for high layers of reinsurance. A limitation stated as a reasonable percentage of premium would also avoid any potential violation of anti-discrimination provisions in tax treaties and of the GATT.

C. The Statutory Language Should Be Clarified to Provide that Lower Layers are Deducted from the Aggregate Liability Subject to Tax

There are practical problems in calculating the aggregate limits subject to the tax, which appear to be a drafting oversight. From the statutory language, it appears that the tax could apply to the entire liability amount, without reduction for any layer not covered. For example, if reinsurance provides $25 million of coverage, after losses have been paid of $100 million, the amount subject to the tax should not be $125 million, but should be $25 million. If the entire amount were taxed, there would be a penalty imposed, in effect, upon coverage of high layers of reinsurance and excess insurance --- just the levels that should be shifted abroad to reduce the impact of catastrophes such as Hurricane Andrew and the San Francisco earthquake upon U.S. insurance companies and, ultimately, the U.S. economy.

The legislation should clearly provide a deduction for the layers of liability not covered by reinsurance or for deductibles or self-insured retentions in surplus lines coverages. Such a deduction is not clearly stated in the current legislation.

D. The Election of the Retrospective Tax should be Simplified

The proposed closing agreement procedure is filled with complexities in implementation. Determining the tax liability may well take months and even years. The current provision calls for collection of the alternate tax on policy limits to continue until the IRS and the foreign insurer reach agreement upon the tax liability. If a large number of foreign companies make the election, the time required could be lengthy.

A much simpler mechanism, such as an election, would be preferable. The election should be effective immediately upon filing, and notice of the election should be made available to U.S. brokers immediately. During the interim between the election and final agreement on liability, the alternate tax should be withheld at the lower rate for the retrospective tax, consistent with the maximum limitation suggested above. The credit for the amount withheld should also be clearly specified in the statute.

V. British and Italian insurers wish to continue working with Administration and Congress in design of the tax

While British and Italian companies intend to comply to the best of their ability, it now appears nearly impossible to sort out U.S. source risks and environmental/non-environmental coverages using a U.K. insurer's annual financial statements during the base period (1971-85). As a practical matter, the majority of British companies will be forced to pay the alternate tax, rather than the retrospective tax. The impact of the alternate tax may vary according to the type of coverage written,*i.e.*, reinsurance which typically provides higher limits of liability than surplus lines insurance will have a much greater tax imposed, even though the premium may be roughly equal in some instances. The alternate tax does not succeed in attaining the tax policy goal of providing a "fair" tax for similarly situated insurers, both domestic and foreign. Yet foreign insurers have no realistic alternative, in many cases.

If the Committee should adopt a prospective tax, as some U.S. insurers have proposed, it would be much simpler to compute, and would be more fair, because all insurers (both domestic and foreign) competing for the same business would pay the same tax on the same premium volume. The tax would not cause variations in pricing the same coverage from one insurer to the next.

While members of the ABI and the ILU believe that a prospective tax is far simpler to administer and more fair, they would like an opportunity to discuss with representatives of the Ways and Means Committee and the Administration the effect of any new tax proposal on foreign companies.

VI. Summary

British members of the ABI, ILU and Italian companies within ANIA support the proposal for an environmental insurance settlement fund. However, they believe the proposed taxes to finance the settlement fund should be revised substantially.

A. Financial statements prepared by U.K. insurers for the base period for the retrospective tax (1971-85) did not separate U.S. business from all other sources of business. The cost of separating U.S. business subject to the retrospective tax would be so great that, as a practical matter, it is virtually impossible for the majority of U.K. companies to elect to pay the retrospective tax. The statute should be amended to provide that the IRS will accept a "reasonable approximation" of base period premiums.

B. The alternate tax on foreign insurers is greater than the current premium for some high layers of reinsurance. A limitation of 1 per cent of the premium should be added so that U.S. companies purchasing "catastrophe" reinsurance will not face a dramatic increase in premiums.

C. The statutory language for the alternate tax should be clarified, so that the tax is not imposed upon amounts in excess of the actual liability covered. A deduction for retentions should be clearly specified. If this clarification were not provided, the tax would, in effect, penalize U.S. insurers for buying high layers of reinsurance.

D. The election to pay the retrospective tax should be simplified, and should become effective immediately.

STATEMENT OF CNA INSURANCE COMPANIES
FOR THE RECORD
SUBMITTED BY DENNIS H. CHOOKASZIAN
CHAIRMAN AND CHIEF EXECUTIVE OFFICER

The CNA Insurance Companies appreciate the opportunity to comment on Titles VIII and IX of the Superfund Reform Act (H.R. 3800).

The CNA Insurance Companies, also known as CNA, is comprised of a number of insurance underwriting companies doing business under the CNA service mark. We are one of the nation's largest insurance organizations with nearly 100 years of experience, more than $40 billion in assets and $5 billion in stockholders' equity. We are the sixth largest provider of property/casualty insurance in the country.

We recognize that the Superfund Reform Act represents an enormous amount of work and a strong commitment by many parties -- including the Administration, Congress, environmental advocacy groups, municipalities, industry and insurers -- to achieve a mutually acceptable compromise.

We see the reform bill as the best available means to make Superfund more effective. In its current form, however, the bill raises questions regarding the funding of the proposed Environmental Insurance Resolution Fund (EIRF). EIRF funding is a crucial issue. It must be dependable if EIRF is to succeed in its goal of decreasing litigation between potentially responsible parties and their insurers.

The tax provisions contained in Title IX present a knotty problem: whether to implement a prospective or retrospective tax to finance EIRF. We believe that there are several significant issues to consider when formulating the tax provisions for insurers.

Retrospective tax. A retrospective tax has two main advantages over a prospective tax: first, it more accurately reflects an insurer's potential current liability; second, it cannot easily be "gamed" or evaded and so will be more readily collected from reinsurers.

On the other hand, a retrospective tax must be immediately accounted for. This immediate booking will be a hardship for companies that have not adequately reserved for this liability.

Prospective tax. A prospective tax has two major advantages: it targets the companies most able to pay and may allow for deferred accounting as it is based on premiums written in the future in defined lines of business.

However, a prospective tax makes it easier for insurance companies -- especially reinsurers -- to manipulate their premium income in order to decrease EIRF obligations. For foreign reinsurers, including some with very large liability exposures, a prospective tax would be a windfall of major proportions. This is particularly true if a prospective tax is collectible only against net direct written premium. In addition, particularly with regard to companies with substantial reserves for environmental liability, a purely prospective tax creates a very material financial incentive for abandoning liability lines of business. This publicly created incentive might disrupt commercial insurance markets and is bad public policy.

The tax, whether retrospective or prospective, must be a steady source of revenue. If Congress decides on a prospective tax, it is essential that the tax include a floor provision to ensure that the tax yields the expected revenue. EIRF was conceived as a massive settlement of existing liabilities within a legislated framework; it was never intended to permit companies with large current liabilities to escape them by removing themselves from the relevant lines of business. A solution could be the imposition of an alternative tax, if larger, on each company's average 1990-1993 premium if premium declines in later years.

Congress has a difficult choice to make concerning EIRF funding: cases can be made for both prospective and retrospective taxation. CNA believes that a 70/30 division between retrospective and prospective taxation -- a proposal originally made by the Treasury Department -- represents a sensible compromise. We support this position. What's most important, however, is that the EIRF tax produce a reliable return. The worst thing to be said about CERCLA is that, despite all the effort and struggle that went into its framing, it doesn't work well. If the Superfund Reform Act is to avoid that fate, the Superfund Reform Act must be assured of the funding that it needs.

WRITTEN STATEMENT BY THE NATIONAL ASSOCIATION OF INSURANCE BROKERS SUBMITTED WITH RESPECT TO THE HEARINGS OF THE COMMITTEE ON WAYS AND MEANS OF THE U.S. HOUSE OF REPRESENTATIVES REGARDING H.R. 3800, THE "SUPERFUND REFORM ACT OF 1994"

I. INTRODUCTION

The National Association of Insurance Brokers ("NAIB") is a trade association of U.S. brokers who place insurance coverage for their clients in both the domestic and foreign insurance markets. Members of the NAIB administer a substantial majority of all commercial insurance coverage placed on behalf of U.S. insureds outside the United States.

This statement is submitted by the NAIB to the Ways and Means Committee in connection with the Committee's hearings on the "Superfund Reform Act of 1994" and other proposals. The focus of this statement is a narrow, but important, issue regarding how to implement one of the funding mechanisms for toxic waste cleanup. Specifically, as discussed below, we will address the responsibilities of those taxpayers who will become withholding agents under the Administration's financing proposal for the Environmental Insurance Resolution Fund.

II. BACKGROUND

In connection with Superfund reform, the Administration has prepared draft statutory language, the "Environmental Insurance Reform Act of 1994" (the "Act"), that would impose certain fees to fund environmental insurance resolution reform. The Act, as currently drafted, would impose a retroactive environmental insurance resolution fee (the "retroactive fee") as well as a prospective environmental insurance resolution fee (the "prospective fee") on insurers, to serve as the funding mechanism to pay for toxic waste cleanup. The retroactive fee would apply to certain commercial net premiums written for the 1971 through 1985 base period. Each insurer who underwrote policies during the base year period, and its successors, would be required to pay an annual retroactive fee based on its adjusted base period commercial premiums, at the rate of 0.20% for the first 24 months, and 0.27% for the following 36 months. Those rates would be subject to adjustment by the Secretary of the Treasury.

The Act would also impose a fee on insurance policies and reinsurance policies issued by foreign persons following enactment of the Act (the "special fee"). Only foreign persons who are not subject to the retroactive fee imposed under the Act, because they are not engaged in a trade or business in the U.S. or are otherwise exempt from U.S. tax pursuant to a tax treaty, would be subject to the special fee. The special fee would be imposed at the rate of 0.50% of the maximum limit of liability of the foreign person under any policy of casualty insurance with respect to U.S. risks.

The special fee would be collected under a withholding system. Specifically, the Act provides that, for any policy issued by a foreign person subject to the special fee, "all persons, in whatever capacity acting, having control, receipt, custody, disposal, or payment of any premium or other amount for such policy shall deduct and withhold from such premium or other amount the amount of the fee...."

It is the practice in the insurance industry for insureds to remit their premium payments to their brokers for transmittal to the underwriting insurance company. Accordingly, NAIB members and other brokers would become withholding agents having the responsibility of withholding the special fee on payments made to foreign insurers.

III. HOW TO IDENTIFY POLICIES ON WHICH WITHHOLDING MUST BE MADE

Each withholding agent broker will be required to determine: (1) whether the underwriting insurance company is a foreign entity; and (2) whether the insurance company is subject to the special fee. Because different layers of an insured's commercial risk which is placed in the foreign market are traditionally split among several insurers (it is the job of the broker to find the appropriate insurer for each layer), some large policies may have upwards of 200 separate insurance companies underwriting various portions of the risk. It will be the responsibility of the withholding agent to determine which of those insurers are subject to the special fee. That task is complicated by the fact that foreign insurers otherwise subject to the special fee will have the ability to avoid the special fee.

The purpose of the special fee appears to be to encourage foreign insurers and reinsurers, without a U.S. trade or business or not otherwise filing U.S. tax returns, to consent to be subject to the retroactive fee. The Act provides that if a foreign insurer or reinsurer consents to be subject to the retroactive fee, it will not be subject to the special fee. Because the special fee is imposed at a substantially higher rate than the retroactive fee, and is imposed on a potentially higher base than the retroactive fee, the NAIB assumes that many foreign insurers will choose to be subject to the retroactive fee in lieu of paying the special fee. The foreign insurers will make that choice by using a closing agreement mechanism provided in the Act. Under the mechanism, the Secretary of the Treasury is authorized to enter into a closing agreement with a foreign insurer, which provides that the foreign insurer will be treated as an assessable person for purposes of the retroactive fee (and thus will not be subject to the special fee). The closing agreement will also provide other provisions that are necessary to ensure proper computation and payment of the retroactive fee.

Because some foreign insurers will be subject to the special fee, and some will not, a broker's responsibility as a withholding agent will be greatly complicated if the broker does not have accurate information as to which insurers have closing agreements and which do not. It will be relatively easy for a NAIB member to identify whether an insurance company is a foreign person that is not engaged in a U.S. trade or business. However, the broker will also need to know whether the foreign person has chosen not to be subject to the special fee. In that regard, someone will have to inform the broker whether a closing agreement exists with respect to the foreign insurer, and whether it is currently in effect.

In the interest of efficient and effective tax administration, the NAIB recommends that the Act specifically direct the I.R.S. to issue a list on a periodic basis, preferably monthly, listing all foreign insurers who have closing agreements in effect. Such a public list would improve accurate compliance by insurance brokers in our role as tax collector of the special fee, and be in the best interest of the government. With access to a published list of closing agreements, a broker will be able to reliably determine whether the broker is required to withhold the special fee when it pays a premium to a foreign insurer. There will be no need to check on a company-by-company basis with the I.R.S., and there will be no question as to whether a closing

agreement provided by the insurer is in fact valid and still in effect. Thus, collections of the special fee will be enhanced.

We note that a similar listing, on a much larger scale, operates with respect to charitable organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code of 1986. The I.R.S. periodically publishes a list of exempt organizations, on which a donor can rely for purposes of determining whether the donor's contribution to an organization is tax deductible. A list of foreign insurers with closing agreements in effect with respect to the retroactive tax would provide similar guidance to brokers who must decide whether or not to withhold the special fee.

We are raising this point with respect to the special fee because the NAIB has experience in another area regarding foreign insurance companies and closing agreements. Section 4371 of the Code imposes an excise tax on foreign insurance and reinsurance premiums, which a U.S. broker is required to withhold. Certain tax treaties exempt foreign insurers from the excise tax, provided that the foreign insurer has entered into a valid closing agreement with the I.R.S. Under current practice, brokers have no effective and simple method of determining whether a foreign insurer has entered into such a closing agreement, pursuant to which the insurance excise tax no longer needs to be collected. Despite repeated requests, the I.R.S. has not published a list of closing agreements in effect. Thus, our members and other withholding agents often face significant difficulties when trying to determine whether a closing agreement is in effect, and face the problem of not knowing whether they can rely on representations of a foreign insurer that it has a valid closing agreement. We can assure this Committee that lack of a list of foreign insurers with closing agreements with the I.R.S. regarding the foreign insurance excise tax makes our task of complying with our withholding obligations much more difficult. We ask that Congress take the necessary steps to see that the same problem does not arise with respect to the Superfund special fee. In fact, we would also ask that Congress consider directing the I.R.S. to publish a similar list of closing agreements waiving the section 4371 foreign insurance excise tax that the I.R.S. has with foreign insurers.

We believe the implementation of our recommendations would significantly simplify the administration of, and compliance with, both the proposed legislation and existing section 4371.

IV. CONCLUSION

In order to improve the ability of brokers and other paying agents to comply with their withholding obligations as collectors of the special fee, the NAIB urges Congress to direct the I.R.S. to issue, periodically, a list of foreign insurers with closing agreements that exempt them from the special fee. The NAIB also recommends that Congress direct the I.R.S. to issue a list of foreign insurers with closing agreements that exempt them from the section 4371 foreign insurance excise tax.

TESTIMONY OF NATIONAL ASSOCIATION OF WATER COMPANIES NATIONAL ASSOCIATION OF PSYCHIATRIC HEALTH SYSTEMS

The National Association of Water Companies (NAWC) would like to thank Chairman Gibbons for holding this hearing today to review the financing aspects of the Superfund Reform Act of 1994. We would like to urge the committee on Ways and Means to act quickly on this important legislation and also to include H.R. 846, as introduced by Representatives Matsui, Jacobs, Archer, Kennelly, Kopetski, Johnson, Herger, Coyne, Neal, Thomas, Sundquist, and Santorum as a revenue neutral amendment. We believe that inclusion of this amendment will go a long way toward furthering the primary goal of the Superfund Reform Act: namely, that Superfund trust fund monies be spent on clean up of contaminated sites and not on non-environmental expenditures.

NAWC is the trade association representing the nation's investor-owned water utilities. It's more than 370 members in 41 states provide safe, reliable drinking water to over 22 million Americans every day. Our members employ a combined work force in excess of 15,000 and have $9 billion invested in gross plant and equipment. We support the Safe Drinking Water Act, the Clean Water Act, and this Committee's efforts to provide a clean environment to all citizens and to future citizens.

WHAT IS OUR CONCERN?

Since the enactment of the Tax Reform Act of 1986, our members have been collecting federal taxes from the builders of new homes, small town governments, individuals and even the federal and state governments, including the Superfund Trust Fund, for something called "Contributions in Aid of Construction" or CIAC. In addition, because the collection of these up front taxes in considered to be taxable income to our members, they must also collect taxes on these taxes. This so-called "gross up" can result in the total taxes collected for Contributions in Aid of Construction equaling as much as 70 percent of the original CIAC.

WHAT IS A "CONTRIBUTION IN AID OF CONSTRUCTION" OR CIAC?

Water suppliers, like all utilities, are capital intensive businesses. Historically, they have received the capital for the construction of a utility extension directly from the customer (typically a home builder, although it can be a public school, a government agency or trust fund like Superfund, or an individual homeowner). The customer contributes this property, or a cash equivalent, to the utility. In this way, utilities can eliminate the need to spread additional borrowing costs, in the form of rate increases, to the existing body of customers who are already paying for the infrastructure.

It is important to keep in mind that privately owned water suppliers are highly regulated by state utility commissions. Almost all state commissions share two general philosophies about our business. First, they do not allow our members to make a profit from water and sewage main extensions paid for by others. Second, costs associated with hooking up new customers should not be borne by existing customers. With a few exceptions, state commissions require private and investor owned water and sewage utilities to collect up-front from the entity paying the CIAC, any taxes or fees associated with the extension of new service.

WHY DO WE PAY TAXES ON CIAC?

Prior to enactment of the Tax Reform Act of 1986, CIAC was not considered as gross income of an investor-owned utility and therefore was not subject to federal income tax. In addition, utilities could not make a profit from CIAC nor could they take tax depreciation or investment tax credits on CIAC.

The Tax Reform Act repealed section 118 (b) of the Internal Revenue Code and thus subjected CIAC to tax as gross income. This change was done without the benefit of a hearing and was done strictly as a revenue raiser.

HOW IS THE TAX TREATMENT OF CIAC RELATED TO SUPERFUND REAUTHORIZATION?

The purpose of Superfund is to clean-up toxic waste sites. Unfortunately, Some Superfund dollars have gone to paying taxes for CIAC. Many contaminated sites eligible for Superfund money contain contaminated groundwater supplies. Often the only way to solve this problem and assure clean, healthy water supplies for people around the site is to bring in water from one of our member companies. Of course, in the cases where our members provide water service to contaminated sites, Superfund dollars must be used not only to finance the main extensions, but also to pay the taxes and the gross up on the taxes. Please see the list of examples attached to this testimony.

HOW DOES H.R. 846 SOLVE THIS PROBLEM AND HOW DOES IT COVER ANY LOST REVENUE TO THE FEDERAL GOVERNMENT?

H.R. 846 restores the pre-Tax Reform Act tax treatment of CIAC to water and waste water utilities. H.R. 846 pays for restoration by extending the depreciable life of water utility property placed in service after enactment of the CIAC tax repeal from 20 years to 25 years using straight-line depreciation rather than the 150 percent declining balance method.

The Joint Committee on taxation has estimated repeal of the tax in CIAC will cost $108 million over five years. The extension of depreciation for our property will raise $140 million over five years, for a net gain to treasury of $32 million dollars.

CONCLUSION

Amending H.R. 846 to the Superfund Reform Act of 1994 will further the intent of Congress that Superfund dollars be spent on clean up of contaminated sites. The Treasury Department testified last year that it does not oppose our amendment. NAWC has worked closely with the Chairman's Committee staff to assure that every concern with the legislation has bee addressed. The Senate has passed its version of H.R. 846 twice in the last few years. Finally, this amendment would bring in $32 million dollars over five years for the U.S. Treasury, and is supported by the National Association of Home Builders. We urge the Committee on Ways and Means to adopt H.R. 846 as an amendment to the Superfund Reform Act of 1994.

CIAC TAX EFFECT ON SUPERFUND SITES BY STATE

Illinois:

1. Kankakee County. The cost to mitigate the leak of automobile fuel into a water systems wellfield will cost $1.5 million, plus approximately $1 million in CIAC tax.

New Jersey:

1. South Plainfield, two projects. The cost of the main extensions totaled $311,795, the tax on these contributions totaled $162,133, a cost increase of over 50 percent.

2. Bridgewater. This project cost $186,898, plus an additional $97,187 in CIAC tax.

3. Warren. This project cost $434,871, plus an additional $226,134 in CIAC tax.

* 4. Washington and Tewksbury Townships. Main extension to mitigate contaminated wells would have cost approximately $1 million, plus CIAC tax of $600,000. Not a Superfund site, project canceled due to cost.

* 5. Franklin Township (Laurel Avenue). Main extension to mitigate contaminated well would have cost $100,000, plus CIAC tax of $60,000. Not a Superfund site, project canceled due to cost.

6. Hillsborough Township (Route 206/Champlain Road). Contamination at wells cause by industrial facility mitigated at cost of $450,000 plus $250,000 in CIAC tax.

7. Dover Township. Mitigation of 16 wells contaminated by municipal sanitary landfill. Cost to Township of main extension $79,327, plus CIAC tax of $40,869.

California:

1. Chico (Stanley Park) A main extension and treatment facility upgrade to provide an alternative water supply for groundwater contaminated by trichloroethylene cost $972,000. The CIAC tax on this project was $417,844.

2. Chico (Northgrave Avenue) A main extension and treatment facility upgrade to provide an alternative water supply for contaminated groundwater cost $231,620. The CIAC tax on this project was $56,799.

Missouri:

1. Saginaw and Silver Creek, two small towns near Joplin. These towns had private wells replaced with central water service to substitute for groundwater contaminated with trichloroethylene. The cost of the main extensions was $839,817 while the CIAC tax was an additional $277,140.

Indiana:

1 Gary (Lake Sandy Jo). Lake Sandy Jo Superfund site is an old gravel pit and recreation site that was contaminated with chemicals and debris in the 1970s. The Army Corps of Engineers was contracted by the EPA to install water mains to a nearby investor owned water utility in order to provide potable water to 50 consumers with groundwater contaminated by the Superfund site. The cost of the main extension was $867,972 while the CIAC tax was an additional $509,152

2. Terre Haute (Ulrich Chemical). To mitigate private wells contaminated by Ulrich Chemical costs approximately $31,000, plus an additional $18,000 in CIAC taxes.

3. Terre Haute (J.I. Case Company). To mitigate numerous wells contaminated by the Case Company costs $166,000, plus an additional $97,000 in CIAC tax. In this case, the company will pass the tax costs onto its existing customers (permitted in Indiana in some circumstances) which contradicts the whole purpose of contributed property which is to shield existing customers from the cost of main extensions to new customers.

Pennsylvania:

1. New Cumberland Army Depot. Centralized water service was provided to residents surrounding the base whose wells had been contaminated by the Army. The cost of the main extension was $57,010, the CIAC tax was $37,393.

* 2. National Guard Armory. Although not a Superfund site, a main extension was requested to mitigate for poor groundwater. The National Guard paid $86,595 for construction and $62,926 for the CIAC tax.

*either not Superfund sites or canceled project

Selective Insurance

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40 Wantage Avenue
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Thornton R. Land
Executive Vice President

August 1, 1994

Ms. Janice Mays
Chief Counsel and Staff Director
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Mays:

We are writing concerning Title IX, the financing provision of HR3800, the Superfund Reform Act of 1994.

We would like to take this opportunity to echo the comments of Richard Smith, President of The Chubb Corp., who spoke on behalf of the Coalition for a Sound Insurance Resolution Fund of which we are a member. Selective Insurance is a group of regional stock property and casualty insurance companies, doing business in 11 states, mainly in the Northeast through independent agents. Approximately two-thirds of our writings cover small to medium size business and our writings include coverage for small to medium size municipalities and boards of education. We insure about two-thirds of the number of school districts and one-third of the number of municipalities in New Jersey.

We are currently involved in 15 Superfund sites in New Jersey with multiple client involvement. We are very much involved in the questions related to Superfund and its revision and we support HR3800 and the creation of the Environmental Insurance Resolution Fund (EIRF) to settle disputes between Superfund Potential Responsible Parties (PRPs) and insurers. We direct our comments to the funding source for EIRF.

Currently, HR3800 provides that 70 percent of the funding shall come from a fee based upon certain insurers' premium writings between 1971 and 1985, with 30 percent coming from a fee based upon "current year" premiums of such insurers. We support this approach to the funding for we feel the 70/30 funding equitably involves insurers to the extent that the policies they wrote may have provided coverage for the activities of their policyholders during the period prior to 1986. Some have expressed concerns about the imposition of a retrospective "tax". We feel that the discussion is to a large degree semantics. The money is being raised through a funding mechanism not for government but for the reduction of litigation and cleanup of Superfund sites. It is for insurance coverage during the period of time from 1971-1985 that litigation between PRPs and insurers has, and most likely will, continue to take place. The 70/30 split places the funding burden on the companies that wrote policies which may provide coverage and have been the subject of a great deal of litigation.

If this formula creates a financial hardship or problem of solvency for some companies because of their current mix of business, financial condition or other reason, we support the use of a weighted formula or other methods that provide for an appropriate relationship between when the fee is paid and when a company wrote the premium.

The clean-up of hazardous waste sights is an important national priority that will be well served by HR3800 and Title IX.

We would like to thank you for the opportunity to express our views and for your consideration.

Very truly yours,

Thornton R. Land
Administration and General Counsel

TRL:rl

Shell Oil Company

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Legal Organization

August 1, 1994

The Honorable Sam M Gibbons, Acting Chairman
Committee on Ways and Means
U S House of Representatives
Washington, D C. 20515

Dear Mr. Gibbons

The Shell Oil Company respectfully submits the following statement for the record of the Ways and Means Committee's hearing on the financing provisions of H R. 3800, The Superfund Reform Act of 1994 Title IX of H.R 3800 would extend the taxes that fund the Superfund for five years. These taxes, discussed in more detail below, are scheduled to expire on December 31, 1995.

Shell is headquartered in Houston, Texas, and operates six refineries in Texas, Louisiana, Illinois, California and Washington In February of 1993 Shell announced a major joint refining venture with Petroleos Mexicanos (Pemex) involving Shell's refinery at Deer Park, Texas Pemex investment in the refinery will enable the refinery to be substantially converted to process heavy Mexican Maya crude oil. This investment includes the upgrading required for the Deer Park refinery to meet the requirements of the U.S Clean Air Act The agreement also provides for Shell to export motor fuel to Mexico. This joint venture has all of the positive trade and environmental policy advantages envisioned by the North American Free Trade Agreement In keeping with these policy objectives, Shell believes that Congress should provide a refund of the environmental taxes paid under section 4611 of the Internal Revenue Code with respect to exported motor fuels. Such a provision would be similar to the refund of environmental taxes on chemicals exported from the U.S

Current Law

Environmental excise taxes are set forth in Chapter 38 of the Internal Revenue Code of 1986 (Code). Subchapter A, sections 4611 and 4612, impose taxes on crude oil and petroleum products. Section 4611 taxes crude oil received at a U.S. refinery and petroleum products entered into the U.S. for consumption, use or warehousing. Section 4611(c) imposes tax at rates of 9.7 cents per barrel dedicated to the Superfund and 5 cents per barrel dedicated to the Oil Spill Liability Fund.

Subchapter B of Chapter 38, sections 4661 and 4662 imposes tax on forty-two taxable chemicals at rates that range from 24 cents per ton to $4.87 per ton, which are dedicated to the Superfund Trust Fund. In general, Subchapter C of Chapter 38, sections 4671 and 4672, imposes tax on certain imported chemical substances, which are derivatives of the chemicals taxed under section 4661, if the chemical taxed under section 4661 constitutes more than 50 percent by weight or value of the materials used to produce the imported chemical derivative. Revenues from these taxes are also dedicated to the Superfund.

Section 4662(e), exempts sales of chemicals taxed under section 4661 or section 4671 that are exported by the manufacturer or producer, and provides a credit or refund of these chemical taxes if the tax has been paid and the chemical has been exported.

Proposed Amendment

The proposed amendment would allow a credit or refund equal to 94% of the section 4611 tax paid with respect to crude oil or petroleum products used to manufacturer or produce motor fuel, under rules similar to the rules applied to exported chemicals under section 4662(e). For purposes of the amendment, motor fuel is gasoline, diesel fuel, and aviation gasoline, as defined in sections 4083(a)(2), 4083(a)(3), and 4093(a).

The amendment would allow a credit or refund of 94 percent of the section 4611 tax paid to prevent any credit or refund from applying to "refinery gains". The phenomenon of volume gains occurs in "complex" refineries. Complex refineries are ones that use catalytic cracking units, coker facilities and other similar processes to enhance production of light motor fuels. When crude oil is processed in a refinery, chemical reactions, generally caused by heat, changes in pressure and catalysts, change the shape and size of the molecules that make up crude oil. Some of the larger molecules with more carbon atoms break or "crack" into smaller molecules. The total number of the smaller molecules weigh the same as the large molecules, but typically they occupy a larger volume. The sum of these increases in volume is referred to as "refinery gain."

Measuring the refinery gains that are present in motor fuels is not as simple as comparing total refinery inputs and outputs since a refinery produces so many other products. Further, different refineries will produce a different mix of products, and even the same refinery will change its mix of products frequently. In William L. Leffler's, ***Petroleum Refining for the Non-Technical Person*** (1985) at page 141, Leffler estimates that complex refineries, those with a catalytic cracker, have a 6 percent fuel gain and very complex refineries, those with a coker and/or an olefins unit can have fuel gains of 10 percent. In addition, the API gravity of the crude oil inputs will also affect the mix of products. On an industry average, refinery output is 105 to 106 percent of refinery input. This 5 percent to 6 percent increase in volume occurs over all the lighter refinery products, which are primarily motor fuels. The average volume gain for motor fuels is likely to be somewhat more than 5 percent. Thus, the

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proposed change would allow a credit or refund equal to 94% of the section 4611 tax paid with respect to exports of motor fuel.

Rationale

In recent years, U.S exports of motor fuels have risen. Table 1 shows the increase in U S exports of motor fuels over the past 10 years

Exports of Motor Fuels* (Thousands of Barrels per Day)

1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
57	77	133	101	91	136	164	297	315	379

* Finished motor gasoline, distillate fuel oil, and finished aviation gasoline. Aviation gasoline exports for these years were zero.

Sources: *Petroleum Supply Annual 1993* and Energy Information Administration.

This trend is a good one for two reasons. First, increasing exports of U.S produced motor fuels preserves U.S refining industry jobs which have suffered cutbacks during the recent consolidation in the refining industry. In particular, a U.S export market for motor fuels, is developing in Mexico, because Mexico does not have sufficient refining capacity to meet motor fuel demand in Mexico. Secondly, U.S. exports of motor fuels are produced in U.S refineries which meet the strict Clean Air Act standards.

Allowing a credit or refund of section 4611 tax paid with respect to the crude oil used to refine exported motor fuel makes U.S. fuel more competitive in world markets. Thus, the proposal removes impediments to this new market for products manufactured in the U.S with corresponding U.S. environmental benefits that are consistent with the objectives of the North American Free Trade Agreement. The proposal is also consistent with the similar treatment allowed for exported chemicals under section 4662(e).

I want to thank you for the opportunity to submit these views for the record of the Committee's hearings.

Very truly yours,

Steve

Stephen E. Ward

STATEMENT OF
TECO ENERGY, INC.
ON TECHNICAL MODIFICATION OF SECTION 29 TAX CREDIT

HEARING ON SUPERFUND FINANCING

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

July 25, 1994

Mr. Chairman and members of the committee, TECO Energy, Inc. is a holding company headquartered in Tampa, Florida. We are principally engaged in the electric utility business through our subsidiary, Tampa Electric Company. We also are engaged in coal mining, shipping, natural gas production, independent power, and other businesses.

When the Committee considers the extension of the taxes for the Superfund program, TECO urges the Committee to consider other environment-related tax measures. Just as the Energy Policy Act of 1992 was used by the Committee as the vehicle for a package of energy-related tax measures, the Superfund bill could be an appropriate vehicle for the committee to compile a package of sensible and low-cost environment-related tax measures.

Our company has been working with several other companies on a minor revision to section 29 of the tax code. Section 29, as it has evolved over the years, is an environmental credit. The credit is available for new projects of only two types: fuel produced with clean coal technologies and fuel produced from biomass, principally landfills.

Section 29 includes a rule that creates unnecessary red tape in many instances. That rule -- referred to as the unrelated person sale rule -- requires taxpayers to sell eligible fuel to an unrelated person to qualify for the credit. The legislative history does not reveal the purpose for this rule. In fact, the new section 45 tax credit that applies to electricity produced from certain renewable sources contains no rule requiring the taxpayer to purchase the fuel from an unrelated person.

Our company is about to break ground on a coal gasification facility in Polk County, Florida. When completed, the facility will turn high-sulfur coal into clean-burning synthetic gas, which we will use on site to generate electricity. The facility will be one of the first of its kind in the country.

It is important to us that the synthetic gas produced in our new facility qualify for the section 29 credit. The facility will implement technologies that have not yet been proven commercially, and the credit will help compensate for the risks inherent in those technologies. Unfortunately, as the tax code now stands, our company will have to adopt an unnatural and contorted ownership structure for the new facility in order to qualify for the credit. Specifically, we will have to interject an unrelated person between the gas production and the electricity generation. We can do that either by selling the gasifier or by selling the generation capacity; we would be most likely to do it by selling the gasifier. One specific option would be to create a joint venture between our company and an unrelated company to take ownership of the gasifier; that joint venture would sell the gas to our company and claim the credit.

There is no conceivable reason why the tax code should make us adopt this sort of ownership structure to preserve the credit. Accordingly, we and other companies have suggested that Congress eliminate the unrelated person sale rule, at least in cases where the taxpayer uses the fuel on site for the generation of electricity for sale to unrelated persons. This proposal was part of last year's tax hearings in the Committee. The Treasury Department testified at the hearings that they agreed with us that the unrelated person sale rule did not serve a useful purpose and that they did not object to our proposal. We also believe the proposal should have little or no revenue cost since the credit is available whether or not the unrelated person sale rule is in the law; the issue is merely how much unnecessary red tape will accompany a company's use of the credit.

Mr. Chairman, our proposal is good for the environment and good tax policy. The Treasury Department has no objection to it, and we strongly urge the committee to include the proposal in the Superfund bill or other available tax vehicle.

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